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Supreme Court, U.S.
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No. 09-___

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526, halliwel@csulb.edu

August 10, 2009

QUESTIONS PRESENTED

1. Right to knowledgeable representation precludes interference with case management Does a Defendant's right to knowledgeable exercise of his rights (as affirmed in *Gideon v Wainwright*) bar requiring evicted Defendants to "switch horses in the middle of the stream" by precluding participation in subsequent attorney fees litigation by a Defendant whose conduct of pre-trial and trial proceedings is the basis for the fees being sought.

2. Unadjudicated Refusal to Allow Self-Represented Defendants to Conduct Own Case Can the right to payment by the opposing side for defending a fees judgment on appeal, be upheld if a party aggrieved by a denial of standing in attorney fees proceedings is not allowed to seek appellate review of such trial court rulings (in violation of CCP § 902, and governing precedents such as *Nelson v Adams*, *County of Alameda v Carleson*, *Varian Medical Systems, Inc. v Delfino*, *Aires Development Co. v Coastal Zone Conservation Commission*, *Conservatorship of Stewart*, and *In re Catherine H*)?

3. Continuing Judicial Action in Violation of Stay per December 22, 2008 Standing Appeal CCP § 916(a) deprives a judge whose order has been appealed of jurisdiction to proceed with aspects of the case related to such appeal. The refusal of the Appellate Branch to take cognizance of Defendants' December 22, 2008 appeal ($280 appeal fee check #3131) from continuing judicial refusal to allow them to conduct their case as per *Gray v Justice's Court* still continues, even though the Hearing Transcripts and Chronological Index needed to initiate appeal briefing are both available.

4. *Ex Post Facto* Application of CCP § 391
Can prior restraint restrictions on "new litigation" pursuant to California's CCP § 391 be applied retroactively, to invalidate a Notice of Appeal filed five weeks before the Vexatious Litigant Finding is made. Where a trial court judge allows a Plaintiff to completely evade legal issues raised by Defendants, and makes no rulings on these issues herself, can Notices of Appeal based on a February 10, 2009 fees award and/or an April 3, 2009 Writ of Execution be barred as "new litigation" by a Vexatious Litigant Finding promulgated on April 17, 2009?

5. Automatic set-aside of all submissions by those labeled Vexatious Litigants by CCP § 391
In Sonoma County Superior Court, self-represented litigants, who have been labeled by that Superior Court as Vexatious, have no rights which a Presiding Judge of that Court need respect. Manifestations of this policy include: **a)** Refusal to take cognizance of a Notice of Appeal from an April 17, 2009 Vexatious Litigant Finding presented and paid for on May 13, 2009, within the 30 day period set by CRC 8.751(a), with no acknowledged judicial action or indication in the Case File, that the appeal was submitted. **b)** During the last 10 weeks of the tenure of Presiding Judge Knoel Owen (April 20, 2009 to June 30, 2009) all documents submitted by Defendants in *Paxinos v Halliwell & Parker* were sent to Judge Owen for approval or rejection, but no action was taken on any of these attempted filings. Since June 30, 2007 the new Presiding Judge Gary Nadler has "pushed back" all attempted filings by Halliwell and Parker, with no indication in the case file of the reason for his rejections, or even acknowledging our submissions.

6. Premature OEX & Single-Action CCP § 391 Abuse to Deny Proper Preparation Time
The pressure on self-represented Defendants from a two-front squeeze created by the timing of briefing schedules for $10,118 and $20,720 fees appeals has been greatly aggravated by eight premature Order of Examination hearings seeking the immediate enforcement of fees awards (contrary to CCP § 916(a) stay provisions) and Judge Rushing's Vexatious Litigant Order to Show Cause, timed to coincide with a hearing on yet another ($19,000) fees motion. Why should self-represented litigants not be accorded the same consideration with respect to competing courtroom and brief preparation demands on their time, as is routinely accorded to attorneys?

7. Disregard of automatic stays without posting an appeal bond provided by State law
Where State statute (CCP § 916(a)) and case law (*Betz v Pankow*) provide for an automatic stay of enforcement of judgments which are not yet final, and exempts judgments which consist entirely of attorney fees and other costs from the posting of an appeal bond (CCP § 917.1(d), *Ziello v Superior Court* and *Nielsen v Stumbos*), is premature enforcement a violation of Due Process of Law and Equal Protection guarantees of the Fourteenth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

This Petition for Certiorari to the California Supreme Court seeks review of the latest phase of a protracted procedural siege which has required more than two years of full time effort by Defendants (two self-represented tenants), to try to keep from being overwhelmed by attorney fees awards (which now exceed $50,000).

On October 2, 2007 (when this litigation was four months old) the California Supreme Court held a televised special session in Sonoma County, at which every member of that Court emphasized the importance of the Rule of Law. So far there has been no tangible expression of such a commitment, other than our State High Court's willingness to accept detailed documentation of the quagmire which this case has become. This Petition does not suggest that the United States Supreme Court try to unravel the

procedural Gordian Knot which this case has become, but seeks only some respite from rogue judicial action (which never cited any supporting caselaw, and increasingly is not even reflected in the Case Record). During such a respite Plaintiff's counsel and the Sonoma County Superior Court should be allowed to try to explain actions which Defendants argue are not merely legally incorrect, but in fact are gross violations of ethical standards for attorneys and judges.

A remand to Federal District Court will have salutary effects, no matter what the underlying facts of this case truly are. If trying to resist Homeowner's Association CC & R's (Conditions, Covenants and Restrictions), which allow a tenant to be condemned anonymously, without having a right to even attend such a proceeding, is indeed compatible with Equal Justice Under Law, as the Federal Courts define it, a

warning to this effect is needed. On the other hand, if the total refusal of various members of the Sonoma County Superior Court to address any of defendants' numerous grievances, turns out to be due to their not having any justification for their treating the Defendants in *Paxinos v Halliwell & Parker* as a Vexatious nuisance, this reality needs to be exposed, so that appropriate corrective action can be taken.

The Statement of the Case in this Petition tries to avoid overlapping our April 20, 2009 and May 18, 2009 Petitions for Certiorari. The three main grievances (with seven aspects noted in our Questions Presented) cited by Defendants are matters of pressing concern which has escalated since our two previous Petitions. They are A) refusal to allow Defendants to even present their case, B) creating an unappealable Vexatious Litigant Order which leaves Defendants with fewer enforceable

rights than Civil Rights litigants in the era of Massive Resistance in some former Confederate States, and C) enforcement of Attorney Fees Awards piled one upon another, which are supposed to be automatically stayed (without an appeal bond) until all appeals have been exhausted.

OPINION BELOW

The focus of this appeal is the various tactical maneuvers by Plaintiff's counsel and the Sonoma County Superior Court to procedurally overload Defendants, while they were preparing their April 20, 2009 and May 18, 2009 Petitions for Certiorari re Judge Rushing's $10,118 and $20,720 attorney fees awards. Defendants responded with their (S170538) February 17, 2009 Petition for Mandamus relief to the California Supreme Court. (The issues and cases in this Petition and its Appendix are referenced in Tables in Appendix at 7-18 and 81-97). The transfer

(in light of *Hagans v Superior Court*) Order of March 24, 2009 (Appendix at 239), Defendants' *Hagans* briefs (Appendix at 241-280) and the First District Court of Appeal Mandamus Denial (A124403, Appendix at 240), left a situation where Defendants needed to update their proposed procedural relief (Appendix at 281-392). The California Supreme Court accepted (Appendix at 393) Defendants' supplemental filings and assigned a new case number (S171792). Five weeks later the California Supreme Court denied review (Appendix at 394).

JURISDICTION

On April 6, 2009 the California Supreme Court assigned S171792 to Defendants' update of their Petition for Mandamus, accepted their accompanying Appendix and issued a briefing schedule for response by opposing parties. However, neither Respondent (Sonoma County Superior

Court) nor Real Party in Interest (Plaintiff's attorney Charles Jensen) offered any response. On May 13, 2009, the California Supreme Court's ruling said only "The petition for review is denied."

The deadline under 28 U.S.C. § 1257 to Petition for Certiorari to the California Supreme Court is August 11, 2009.

RELEVANT STATUTORY PROVISION

No Sonoma County Superior Court opinion has even addressed the governing precedents cited by Defendants (or provided any reference of their own to case law), much less tried to apply them to the circumstances of *Paxinos v Halliwell & Parker*. The State Appeal Courts with discretionary review power, have always declined to exercise it, without any explanation. Therefore, interpretation of state law is not a factor in this appeal. Defendants seek only application of well settled rights under State

law, as they are guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

The well established legal standards whose protection is FEDERALLY MANDATED for every person within the jurisdiction of California courts, includes these governing precedents, cited in our March 20, 2009 Petition to the California Supreme Court (Appendix at 177): *Hall v Superior Court* (2005) 133 Cal.App.4th 908, 919 affirms:

> Court rules should be designed to accomplish the ends of justice, to protect rights, and to implement the substantive law. When a policy, practice or rule operates instead to defeat these purposes, and deprives an accused of a fair trial or determination on the merits, then the policy, practice or rule must give way.

Adams v Murakami (1991) 54 Cal 3d 105, 120 states:

> The issue is not merely a question of trial strategy. As our former colleague Justice Peters aptly put it, "**The trial of a lawsuit is not a game where the spoils of victory go to the clever and technical regardless of the merits**, but a method devised by a

> civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves." (*Simon v City of San Francisco* (1947) 79 Cal.App.2d 590, 600)

Defendants March 12, 2009 Appendix H to the California Supreme Court notes (at 114:1-9):

> *Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851 provides for the issuance of a writ of mandate where "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (CCP Sec 1086).....
>
> The *Babb* opinion emphasizes the Court's reluctance "to employ prerogative writs" for ongoing proceedings, saying: "Indeed, we perform such a function of intermediate view with extreme reluctance." However, *Babb* continues: "However, upon occasion our attention is drawn to instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ. (See *Holz v Superior Court* (1970) 3 Cal 3d 296, 301, fn 4.)" In *Holz, supra*, the High Court ruled: "Where it appears that the trial court has made a ruling which deprives a party of the opportunity to plead his cause of action or defense, relief by mandamus may be appropriate."

Our Mandamus request fits this standard.

STATEMENT OF THE CASE

A. Interference with Case Management

1. Right to knowledgeable representation

Defendants' March 27, 2009 Update re California Supreme Court transfer of S170538 (Appendix at 267), cites a Defendant's right of self-representation affirmed in *Faretta v California* (1967) 422 U.S. 806, 812-813 and the similar mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423. Defendants quote the September 25, 2007 Fees Hearing Transcript (at 466:21 to 467:8) to show how Judge Rushing completely silenced Defendant Halliwell (not even allowing him to explain why he had standing), citing no authority for this edict other than "it's in the law library and all the practice books." (Id. at 14)

Defendants' May 5, 2009 Reply to Prior Restraint imposed by Judge Beaupre's Order states:

> Where secrecy is a deliberate device for making it difficult for unlawful detainer defendants to learn of their rights, the logic of *Gideon v Wainwright* (1963) 372 U.S. 335, 345 applies. In Unlawful Detainer actions, 90% of defendants are self represented, so this aspect of *Gideon, supra,* provides a close parallel: "*Even the intelligent and educated layman has small and sometimes no skill in the science of law.*" It is the purpose of CCP § 1161.2(c) to keep consultants from remedying this situation. And in Sonoma County Superior Court, the fortified version of this statute nearly guarantees the tenant will lose, thus creating another Gideon parallel: "*He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.*" (Id. at 22)

Even when Defendants were able to figure out what procedures the Sonoma County Superior Court required them to follow, these procedures were often abrogated where necessary to keep unrepresented litigants from effectively presenting their case. An important incident involving the judge (Gary Nadler) originally assigned to *Paxinos v Halliwell & Parker* (who continues to have an influential role in the case

because he is now Presiding Judge of the Sonoma County Superior Court), is an example of this bias.

Defendants' June 14, 2007 Form UD-150 Counter-Request To Set Case For Trial is a very important document in terms of its implications. The existence of such a document with such a date shows the ridiculous nature of Judge Nadler's initial decision to convert the lawsuit into a court trial because the address of the property in dispute was not repeated in #2 just above the two seeming alternative "a" and "b" check boxes. This redundancy was included in the form to provide a landlord who may have several evictions going on at once, a quick way to tell which was which, IF THE TENANT WERE NOT SELF REFPRESENTED, AND THE ADDRESS AT THE TOP OF THE FORM WAS THAT OF HIS LAWYER. This is not a case of a Judge who made a good faith mistake, with respect

to the intent of a rule. It is a case of a judge determined to favor the landlord as much as he could, who had to back down because he had no case to counter clear-cut governing precedents, such as that cited in our June 8, 2009 Memo (at 5:15-16): "The law aspires to respect substance over formalism and nomenclature." (*City of Shasta Lake v County of Shasta* (1999) 75 Cal.App.4th 1, 11).

Another example is Judge Nadler's policy of not allowing oral argument and disposing of tenants' pre-trial motions via Ex Parte Applications.

The Judges of Sonoma County Superior Court are apparently determined to avoid a repeat of what happened in *Elkins v Contra Costa County Superior Court* (2007) 41 Cal 14th 1337. The routine denial of oral argument under Sonoma County Superior Court Local Rules for Ex Parte Applications is vulnerable under *Elkins*, which struck down a Contra Costa

Family Court affidavits-only procedure. In *Elkins* oral argument, Justice Kennard cited *Goldberg v Kelly* (1970) 397 U.S. 254, 268-269, which affirms:

> [The person facing property deprivation] is not permitted to present evidence to the official orally, or to confront or cross-examine adverse witnesses. *These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.* Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, **written submissions are a wholly unsatisfactory basis for decision.** (Emphasis added.)

Defendant Halliwell explains the implications of being denied oral argument:

> *Moles v Regents of University of California* (1982) 32 Cal 3d 867, 872 observes:
>
> Oral argument provides the only opportunity for dialogue between the litigant and the bench. As a result, "it promotes understanding in ways that cannot be matched by written communication." (Commission on Revision of Federal Court Appeals System, Structure and Internal Procedures: Recommendations for Change (1975) p. 48.) For example, in complex cases, oral argument "provides a fluid

> and rapidly moving method of getting at essential issues." (ABA Committee on Standards of Judicial Administration, Standards Relating to Appellate Courts. (Approved Draft 1977) p. 56.) In the words of one judge, "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar." (Cutler, Appellate Cases: the Value of Oral Argument (1958) 44 A.B.A.J. 831, 832; see generally Stern, Appellate Practice in the United States (1981) pp. 358-359.) No proof of the value of oral argument is more compelling, however, "than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result." (Commission on Revision of the Federal Court Appeals System, Structure and Internal Procedures: Recommendations for Change, *supra*, at p. 47.) This aspect of oral argument – the chance to make a difference in result – is extremely valuable to litigants.

The undisputed basis for adverse impact on Defendant Michael Halliwell of past and potential future attorney fees awards, and his satisfying the other two prongs of the *Powers v Ohio* (1991) 499 U.S. 400, 410-411 *jus tertii* standing criteria are

documented in quotations from California Supreme Court filings in Appendix at 173-174.

When Charles Jensen brought forward his $20,720 reading-fee motion, Judge Rushing would not allow Defendant Halliwell to participate in the hearing on that motion, without even discussing how this ruling related to governing precedents on standing (such as *Powers v Ohio* (1991) 499 U.S. 400, 410-411, 413-414). At this May 6, 2008 Hearing, Defendant James Parker protested: "Since the Court has never cited any case law as to why Michael Halliwell has not been allowed to speak, I would ask the Court to cite some case law as to why not." (Transcript at 5:10-12) Judge Rushing replied: "I'm not required to do so and I decline that request." (Ibid at 5:13-14)

Defendants' March 27, 2009 Update re California Supreme Court transfer of S170538

(Appendix at 268) cites appeal briefing where Charles Jensen concedes that Defendant Halliwell is adversely affected by any attorney fees award to Plaintiff's counsel. This Update notes that, in not allowing any input at all from the Defendant who conducted the proceedings for which fees shifting is sought (September 25, 2007 Hearing Transcript at 473:3-14), Judge Rushing violated the mandate of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114: "*The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.*" (Id. at 14)

2. Aggrieved party's CCP § 902 rights

Defendants' May 13, 2009 Appendix (at 46:6-19) discusses the handling of standing on appeal:

> At the September 25, 2008 Appeal Hearing, Judge Chouteau launched a broad attack

(Transcript 3:15 to 4:1) on Defendants' right to argue their case as they had prepared to do:

> #1: Judge Chouteau said: "Now at this time, this is an appeal at least of an attorney's fees award against Mr. Parker, not against Mr. Halliwell." *Warth v Seldin* (1975) 422 U.S. 490, 504 provides: "The fact that harm to petitioners may have resulted indirectly does not, by itself, preclude standing."
>
> #2: Judge Chouteau continued: "Mr. Parker do you wish to add anything." James Parker responded: "Yes. I would like to have Mr. Halliwell speak." Judge Chouteau responded: "He cannot argue on your behalf. He is not an attorney." In *Craig v Boren* (1976) 429 U.S. 190, 195, the beer manufacturer had the right to argue, in behalf of his interest in increasing beer sales, the right of his potential customers to gender equality in the drinking age.
>
> #3: Judge Chouteau said to James Parker: "If you want to present something in addition to your papers, you may do that." James Parker responded: "Okay. Since I did not expect to be the one to talk, I would like to read my argument into the record." Judge Chouteau replied: "No. You may not read an argument. Sir, if you have additional information to provide in

> addition to your briefs, you may do so. I don't want you simply reading something Mr. Halliwell prepared."

Defendants' May 13, 2009 Notice of Appeal (at 100:20 to 101:2, quoted in Appendix at 182-183) shows a strong parallel between our standing issue and key precedents evaded here by Judge Chouteau.

After Judge Chouteau continued to disregard Defendant Halliwell's right as an aggrieved party to challenge Judge Rushing's ruling, at the next Appeal Hearing, Defendants' raised the issue of Judge Chouteau's right to take part in the panel which would consider a challenge to Judge Rushing's right to adjudicate a third fees motion (in a February 2, 2009 Petition to Sonoma County Superior Court Presiding Judge Knoel Owen). However, Judge Owen waited three weeks until (February 25, 2009) after the third fees hearing had already taken place,

and ruled our petition "procedurally insufficient" without explaining why.

Defendants' March 20, 2009 California Supreme Court Memorandum, updating their March 17, 2007 OEX Hearing Stay Motion, discusses a key aspect of those proceedings:

> Co-Defendant Michael Halliwell was also present, and must reimburse Defendant Parker for any fees he pays, according to a long standing agreement that is as binding as any contractual fees obligation that James Parker may be thought to have under the rental agreement (see *Nelson v Adams* (2000) 529 U.S. 460, 472 parallel [Appendix at 175-176]). But in accordance with the Court's continuing policy, Defendant Halliwell was silenced and not even allowed to sit at the Defendants' table. This exclusion was appealed, and our December 22, 2008 Notice of Appeal was acknowledged by the Appellate Branch that same day. Since a court cannot (consistent with CCP Sec 916) take action on any aspect of a case covered by an appeal, it cannot continue to conduct proceedings in a manner violative of Defendants' right to conduct their own case (see *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423 citation [Appendix at 167-168]). (Id. at 3)

3. Ignoring December 22, 2008 appeal

Defendants' March 27, 2009 Update re California Supreme Court transfer of S170538 (Appendix at 250-251) cites continuing violation of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423, which affirms: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.'*" Defendants' Update notes that their December 22, 2008 standing appeal and *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 190 bars this continued violation of their procedural rights. *Varian* affirms: "if the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable . . . *that proceeding must be stayed under section 916, subdivision (a).*" (Id. at 5-6)

Defendants' Update continues (Appendix at 268-269) to cite the mandate of *Warth v Seldin*

(1975) 422 U.S. 490, 504, that the indirectness of an injury does not preclude standing. This Update cites further governing precedents (*Powers v Ohio* (1991) 499 U.S. 400, 410-411, *Aries Development Co. v Coastline Coastal Zone Conservation Commission* (1975) 48 Cal.App. 3d 534, 542, *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736) resolutely ignored by the Sonoma County Superior Court Appellate Branch, in its defiance of Code of Civil Procedure Section 902. *Conservatorship of Stewart* (1969) 276 Cal.App.2d 211, 215, sums up Defendants' right to appeal Judge Rushing's denial of standing: "In other words, *a party is 'aggrieved' by an order, within the meaning of section 902, even if his grievance turns out to be legally without merit.*" (Id. at 14-15)

B. Unfair Labeling as Vexatious Litigants

4. *Ex Post Facto* application of CCP § 391

Defendants' March 27, 2009 Update re

California Supreme Court transfer of S170538 (Appendix at 251-252) points out that Judge Rushing's Vexatious Litigant Initiative cites a portion of CCP sec 391 which refers to "attempts to relitigate the validity of **final determinations or the issues therein**." This cannot possibly apply to an attorney fees award granted and appealed well BEFORE the April 17, 2009 Vexatious Litigant Order was handed down by Judge Beaupre. (Id. at 6)

Defendants' April 3, 2009 Petition for Review of Court of Appeal Mandamus Denial (Appendix at 297) notes that the thrust of Judge Rushing's "Vexatious Litigant" initiative is to attempt to shut down Defendants' discretionary appeals, on the theory that rulings in her favor by the Appellate Branch amount to final dispositions. However, neither Judge Rushing nor any of the Judges ruling

in her favor have EVER given ANY reasons for their rulings. (Id. at 10)

Defendants quote their analysis of the May 6, 2008 Fees Hearing Transcript (at 16:14 to 17:20 in Appendix at 415-416) which discusses how Judge Rushing refused to consider the validity of Plaintiff's only basis for being paid to read what he claimed was "whimsy, dribble and nonsense." This analysis quoted Charles Jensen's Fees Motion which argued: "Defendants forced plaintiff's counsel to read all of his papers. Unfortunately, counsel was not in a position to assume they were all a joke. An old Irish saying states: 'Even a blind pig can find a truffle every now and then.'" Judge Rushing flatly refused to require any substantiation of Charles Jensen's dismissive claims, saying: "I'm not going to force him to do that."

Defendants' April 9, 2009 California Supreme Court Appendix states:

> In his April 6, 2009 Amicus Curiae Brief in support of this initiative (at 7:15-22), Charles Jensen urges the Court to issue an order requiring permission of the presiding judge of the Superior Court to allow JAMES PARKER and/or MICHAEL HALLIWELL to "file any document . . . maintaining any pending action or proceeding (including the present action which is now finally determined)" even though Jensen himself is seeking an additional $19,000 in attorney fees (which has secured the approval of only Judge Rushing).
>
> Judge Rushing sidetracked Defendants' motion to stay her hearing on this $19,000 fees motion onto her March 24, 2009 Law & Motion Calendar, then cancelled this March 24, 2009 hearing and finalized her fees award with a Tentative Ruling (issued in violation of Local Rule 2.2D, and effectuated over Defendants' written request that the hearing be held). (Id. at 1)

Judge Dean Beaupre included the underlined language in his Vexatious Litigant Finding.

5. Automatic set-aside of all submissions

Romer v Evans (1996) 517 U.S. 620, 633,

precludes making legal *persona non grata* of litigants with the temerity to thoroughly document a Superior Court's undermining of the Rule of Law: "**Central both to the idea of the rule of law and to our own constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.**" *Romer v Evans* (1996) 517 U.S. 620, 635, further explains why a stay of the Sonoma County Superior Court's obstruction of U.S. Supreme Court filing rules is justified: "**A state cannot so deem a class of persons a stranger to its laws.**"

When Defendants attempted to file their timely May 13, 2009 Notice of Appeal from the Order of April 17, 2009, we were referred by the window deputy clerk to Supervisor of Clerks (Donald G. Lewin), who asserted that unless it was accompanied

by a prefiling Order (certifying that the appeal was meritorious) our Notice of Appeal could not be filed. This application of the Order of April 17, 2009 made this order effectively unappealable, without the consent of the Court whose order the aggrieved party sought to appeal. Such a concept is antithetical to the Rule of Law, and is an attempt to exercise the sort of unbridled discretion stricken down by the U.S. Supreme Court in *Yick Wo v Hopkins* (1886) 118 U.S. 356, 373-374: "In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void." After protracted discussion, Supervisor of Clerks Lewin accepted Defendants' May 13, 2009 Notice of Appeal and a check (#3187) for the $315 filing fee. Our Notice of Appeal was stamped "**RECEIVED BUT NOT FILED, MAY 13 2009**" (but we were

informed by Supervisor Lewin that he would forward it immediately to Presiding Judge Knoel Owen, who would make a ruling on our right to appeal). However, Defendants have received no response from Judge Owen on this (or any other subject related to the April 17, 2009 Vexatious Litigant Order), as of August 9, 2009.

Defendants' June 8, 2009 Memorandum (Appeal Briefing Issues re CCP § 916(a) Stay) quotes *Morton v Wagner* (2007) 156 Cal.App.4th 963, 970-971, which clearly shows that Vexatious Litigant Findings are appealable:

> Any determination that a litigant is vexatious must comport with the intent and spirit of the vexatious litigant statute. The purpose of which is to address the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts.

Defendants' June 8, 2009 Memo continues:

Wolfgram v Wells Fargo Bank (1997) 53 Cal.App.4th 43, 58 affirms: "Only those citizens who decline to hire lawyers, lose five suits in seven years, then undertake a sixth suit which lacks merit, will be labeled vexatious." Defendants' filing of motions for reconsideration before appealing cryptic Appellate Branch orders upholding fees awards, is NOT a legitimate part of a vexatious litigant finding. Thus *Morton v Wagner* (2007) 156 Cal.App.4th 963, 973 observes:

> In enacting California Rules of Court, Rule 8.108(d), which allows an extension of time to file a notice of appeal where the appellant has filed a motion to reconsider pursuant to section 1008, the Legislature expressed favor for motions to reconsider. . . . .
>
> All three of defendant's motions relied on established and favored procedures for petitioning the court to modify or reconsider their order. Once appellant moved to reconsider the original order, and that request was denied, he did not continue to petition the court for redress in suspicious or unconventional ways. He accepted the judgments and orders and sought redress from the reviewing court. Under these circumstances, the appellant cannot be found

> to have abused the process by filing unmeritorious and frivolous motions simply to harass the respondent. Therefore, these motions do not support a vexatious litigant designation.

When a Vexatious Litigant Statute is applied in a way which infringes fundamental constitutional rights, prior findings of constitutionality do NOT shield it from challenge. Thus the *Wolfgram v Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 50 Court of Appeal observes: "We are unaware of any doctrine which insulates a statute from one constitutional attack, simply because it has survived a different constitutional attack." *Morton v Wagner* (2007) 156 Cal.App. 4th 963, 974, overturns an improper application of CCP § 391:

> The order designating appellant a vexatious litigant is reversed. The prefiling order requirement is hereby stricken. The clerk of this court is directed to forward a copy of this opinion to the Judicial Council with instructions that they remove appellant's name from the list of vexatious litigants. (Id. at 8-9)

Defendants' April 27, 2009 Motion to Vacate

Judge Beaupre's Vexatious Litigant Finding says:

Defendants' Response to Questions Presented concludes by examining the claim, in the Order of April 17, 2009 (at 6:15-17), that Defendants "repeatedly filed unmeritorious motions, pleadings or other papers, and engaged in tactics which were frivolous or solely intended to cause unnecessary delay." #23 shows that each of these elements of vexatiousness set forth in CCP § 391 finds a counterpart in the behavior of Judge Rushing and/or Charles Jensen. The Order of April 17, 2009 (at 2:13) flatly misstates the record in saying: "Defendants waived jury." In fact, as documented in **#23A**, Charles Jensen was temporarily successful in getting Judge Nadler to reject Defendants' demand for a jury trial, on the utterly frivolous basis that Defendants put the address of the disputed property in the wrong place on their jury request form. As a result of Charles Jensen's repeated attacks on Defendants right to a jury trial, Defendants were denied any input into jury instructions. **#23C** Describes how James Parker was stripped of his Sixth Amendment rights and how the case was decided by Judge Rushing's exclusion of evidence of arbitrary discrimination, and unjustified and unexplained admission of an anonymous compilation of hearsay evidence. One of the most outrageous of the evasive maneuvers by Charles Jensen and Judge Rushing is discussed in **#23E**, which describes how CRC 8.750(a) requiring liberal construction of

> Notices of Appeal and CCP § 916(a) requiring a stay of proceedings in trial court re matters being appealed, were vitiated. (Id. at 6)

Defendants' April 23, 2009 brief cites this misrepresentation in Judge Beaupre's April 17, 2009 Vexatious Litigant ruling:

> "Mr. Parker and Mr. Halliwell have repeatedly relitigated or attempted to relitigate in propria persona, the validity of determinations against them where the findings against them had been finally determined. CCP § 391(b)(2)(I & II)." (4-17-09 Filing at 6:11-13) (Id. at v)

Defendants' April 23, 2009 brief cites an opinion by the author of Judge Beaupre's only cited precedent, which clearly does not support trying to define ongoing fees litigation in a single lawsuit as repeatedly filing "new litigation". Thus Justice Gary E. Strankman writes in *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1009:

> The vexatious litigant statute speaks in terms of "litigation." It defines vexatious litigants by the number of prior unsuccessful "litigations" they have undertaken (five in the past seven

> years), or by the fact of their persistent relitigation of "litigation" finally determined adversely to them. (§ 391, subd. (b).) Its provision for prefiling orders applies to the filing of any "new litigation." (§ 391.7.) (Id. at viii)

Defendants' April 23, 2009 Vexatious Litigant

Proceedings Line Numbered Transcription notes:

> "The real tragedy of this case is that the original plaintiff, Mr. Paxinos, has had to continue to pay his lawyer tens of thousands of dollars to review the materials and appear in court on this vexatious litigation." (4-17-09 Filing at 5:21-23) (Id. at v)

Defendants' April 27, 2009 Motion to Vacate

Judge Beaupre's Vexatious Litigant Finding says:

> In fact, Plaintiff's lawyer's review of documents and appearances in court have nothing at all to do with the so-called vexatious litigation by Defendants (their appeals to courts above the local Appellate Branch). This is so because Charles Jensen has not filed a SINGLE WORD of response to any of the five discretionary appeals listed by Judge Rushing as satisfying the requirements of CCP § 391, nor has he ever appeared in court with respect to them. (Id. at 4)

Defendants' April 27, 2009 Motion to Vacate

Judge Beaupre's Vexatious Litigant Finding says:

> The Order of April 17, 2009 does not reject or even examine Defendants' grounds for legally challenging the landlord's decision to evict them, or count trial court proceedings in MCV 191306 toward CCP § 391's five frivolous litigations in the past seven years requirement. Thus the Order of April 17, 2009 concedes (at 6:4-5): "Mr. Parker and Mr. Halliwell were defendants in the unlawful detainer case and so it does not count as one of the five cases." It is the appeals which "Mr. Parker and Mr. Halliwell have repeatedly relitigated or attempted to relitigate" (Order at 6:11) which form the basis for Judge Beaupre's Vexatious Litigant finding. However, NONE of Defendants' grievances presented at their second (September 25, 2008) or third (November 20, 2008) Appellate Branch Hearing was even perfunctorily adjudicated even ONCE, because of various procedural evasions by Appellate Branch Presiding Judge Rene Auguste Chouteau (such as flouting Defendant Michael Halliwell's right as a party aggrieved by Judge Rushing's denial of standing, to argue this issue on appeal pursuant to CCP § 902). (Id. at 2)

James Parker's June 11, 2009 Affidavit (#5 in Appendix at 414) points out two years of refusal by

the Sonoma County Superior Court to pay the slightest attention to Defendants' well documented charges that Charles Jensen has violated rules for attorneys in Business & Professions § 6068(d), and this Court's actually requiring Defendants to pay for Jensen's fraudulent tactics, in violation of *Clark v Millsap* (1926) 197 Cal 765, 785.

Defendants' March 12, 2009 California Supreme Court Filing (Appendix at 414-415) states:

> James Parker's November 20, 2008 oral remarks, which give the details of eight false statements in Respondent's October 27, 2008 Opposition Brief (Transcript at 13:27 to 17:3), and the lie in Charles Jensen's oral statement (the details of which are set forth in our January 2nd Mandamus Petition at 53:16 to 54:8) which Respondent's Opposition does not try to explain, except to say: "Counsel for Respondent has never been caught lying." James Parker further quoted Respondent's Opposition: "While counsel for respondent has read the appellants' Index of Plaintiff's Misrepresentations and Rules Violations, there was nothing in it worthy of response." James Parker then asked: "Does Charles Jensen wish at this time to explain any of his

latest alleged misrepresentations, or cite anything incorrect in our previous charges of professional misconduct?" When Charles Jensen said nothing, James Parker said to the Court: "Your Honor, I just want it to be said that there was no response." Judge Chouteau responded: "I am indicating there should not be a response." (Transcript at 17:7-23)

Defendants' April 27, 2009 Motion to Vacate

Judge Beaupre's Vexatious Litigant Finding says:

After noting the September 25, 2007 date of the hearing and the names of those attending, here is the entirety of Judge Rushing's first fees order: "Judgment for Plaintiff CHRYSANTHE E. PAXINOS against Defendant JAMES PARKER for attorney's fees in the amount of $10,000." This ruling was upheld by the Appellate Branch, whose Order of October 7, 2008 describes the same locational and attendance information for its hearing as Judge Rushing's Order, but says only this about the Order: "Appellants fail to demonstrate any reversible error with respect to the September 25, 2007 attorney fee order." Judge Rushing's second fees order gives locational and attendance information for the May 6, 2008 Hearing, but makes only this barebones statement about fees (with NOTHING about the reasons for them): "The Plaintiff's motion for attorneys fees for Plaintiff CHRYSANTHE E. PAXINOS as to Defendant JAMES PARKER only is granted in the

amount of $20,680 and $40.00 for filing fee." This fees award was ONLY for reading Defendants' briefs, with no link to any work product, and no link for the briefs Charles Jensen read, to any issue on which Plaintiff has been found to be the prevailing party. The Appellate Branch December 5, 2008 ruling upholding Judge Rushing's $20,720 fees award, could just as well have been stapled to a first page of case identifiers for any fees appeal that came before them. It said: "The trial court's attorney fee Order is **AFFIRMED**. De Novo review indicates that an award of attorney's fees was proper and review of the record under the abuse of discretion standards indicates that the amount of attorney's fees is also proper." (Id. at 2-3)

C. Deliberately Overloading Defendants

6. Premature OEX & CCP § 391 pressure

Defendants' March 30, 2009 Memorandum (Status of Updated Mandamus Petition) says:

> The First District's Order of March 26, 2009, does not purport to find that S170538 is "substantially identical to a prior petition." Such a holding would be very difficult to defend in light of this Petition's focus on the Fourth and Fifth Front procedural squeeze created by Judge Rushing's $19,000 attorney fees award (not a factor in Defendants' procedural concerns until a sequence of events starting on

> February 2, 2009) and Judge Rushing's "vexatious litigant" initiative (which was filed on February 9, 2009, long after Defendants' previous Mandamus Petitions were filed). (Id. at 2)

Defendants' April 3, 2009 Appendix re Denial of Mandamus by the Court of Appeal (Appendix at 343) cites a key precedent contrary to the deliberate "jamming" of Defendants in *Paxinos v Halliwell & Parker* manipulating various briefing schedules to create a "two front" squeeze. *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1289 held: "The judge's comments that he could 'jam' Gamet and that he wanted to 'keep the heat on,' when combined with the unexplained judgment dismissing the action shortly thereafter, seemed arbitrary and created the appearance of substantial unfairness." (Id. at 9)

Defendants' April 27, 2009 Motion to Vacate Judge Beaupre's Vexatious Litigant Finding says:

> The Order (4:2-5) criticizes Defendants for seeking to separate out a fees appeal for separate consideration, and asserts: "The only conceivable object of this tactic is delay." However (as #10 demonstrates), it was a delay in transcript preparation which was the basis for Defendants' separate hearings motion, and it was a three-month-long refusal of the Appellate Branch to update the Chronological Index that caused unnecessary delay which brought the hearings on the $10,000 and $20,720 fees award so close together, that it was impossible for Defendants to properly handle their overlapping briefing and hearing preparation tasks. (Id. at 5-6)

Defendants' April 27, 2009 Response to Judge Beaupre's Question Presented #10 observes:

> There is no reason that it should have taken more than three months to prepare the 13-page transcript of the September 25, 2007 fees hearing. This delay by court employees is the basis for Defendants' seeking to separate consideration of their July 24, 2007 (jury trial) appeal, from the fees issue, as their January 24, 2008 Appeal Transcript Appendix notes (2:16-19):
>
> > At the January 24, 2008 Appeal Hearing problems relating to documenting these events were discussed. Michael Halliwell continued his dialogue with Judge Chouteau: "There is a second

> matter that I submitted to Judge Boyd relating to the late availability of the transcripts that we relate to the fees aspect that was consolidated with this. The transcripts came in so late that I'm asking for separate consideration of the matters that related to the transcript of September 25th, which became available to us on January 15th." (Transcript at 3:7-13)
>
> Judge Chouteau replied: "This is a different issue which is on our June calendar." (Ibid at 3:15-16)

In their April 23, 2009 brief, Appellants quote a supporting authority in Judge Beaupre's own cited precedent, which shows that forcing consolidation of appeals in the above circumstances violated Appellants' rights. *State Farm Insurance Co. v. Superior Court* (1956) 47 Cal 2d 428, 430, 432 held:

> Petitioner concedes that "actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right." (Code Civ. Proc., § 1048.) However, as petitioner contends, the consolidation here does result in such prejudice to petitioner. . . . . We therefore conclude that petitioner is entitled to a writ of mandate

ordering respondent to sever its declaratory relief action from the personal injury actions. (Id. at vi)

Defendants' June 11, 2009 Claim of Exemption & Supporting Affidavit re $833 Seizure states:

> Defendants' May 18, 2009 Certiorari Petition Appendix quotes an important ruling from the bench (at the January 20, 2009 OEX hearing) by the most recent former Presiding Judge of Sonoma County Superior Court, Robert S. Boyd: "**So now that I am beginning to get a clearer picture of the whole story, not just this Court's role, which was enforcement of the judgment, I believe that the Court was premature in the finding of contempt. At this time I am going to vacate the finding of contempt, as that matter of enforcement of the $20,000 is on appeal.**" (Transcript at 18:2-8) This levy to enforce this $20,720 judgment flies in the face of Judge Robert Boyd's April 17, 2009 ruling that enforcement of this judgment is still premature.
>
> On April 17, 2009, Judge Dean Beaupre also issued an Order, presuming to subject every action taken by Defendants in any aspect of this case to prior approval by the current Presiding Judge of the Sonoma County Superior Court, Knoel Owen. Defendants tried to clarify this Order with a motion for reconsideration, but Judge Beaupre has not

> responded. On May 13, 2009 Defendants appealed Judge Beaupre's Order, so it has no current force (until and unless it is upheld on appeal). In the past six weeks, this complicated procedural situation has been the subject of several submissions to Presiding Judge Owen, all of which are still unanswered. (Id. at 1)

7. Continued disregard of automatic stay

The central issue in all of the attorney fees awards piled one atop another is the Due Process protection of the Fourteenth Amendment. California law bars enforcement of judgments consisting entirely of attorney fees awards and other costs until appeals from such awards have been exhausted. For at least eight decades no state court has questioned the final word on Due Process issues of the United States Supreme Court, because *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 681, notes that "it may be observed that the plaintiff's claim is one arising under the federal Constitution

and, consequently, one on which the opinion of the state court is not final." However, Judge Rushing's repeated fees enforcement activity is based on the concept that such awards become final once the Appellate Branch of her Superior Court has reviewed them.

Defendants' February 9, 2009 Federal Issue Review cites a key case that rejects this usurpation:

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. (*Broad River Power Co. v South Carolina* (1930) 281 U.S. 537, 540) (Id. at 9:16-25)

Judge Rushing has repeatedly flouted the holding of *Ziello v Superior Court* (1999) 75 Cal.App. 4th 651, 654-655 that a judgment consisting entirely

of attorney fees "is solely for costs within the meaning of Code of Civil Procedure sec 917.1(d). Accordingly, no bond is required to stay enforcement of that order pending appeal." This holding is based on *Nielsen v Stumbos* (1990) 226 Cal.App.3d 301, 303, which affirms that "the fees are costs and the filing of a Notice of Appeal stays execution without the posting of an undertaking." (See Appendix at 404-405.)

Defendants' June 11, 2009 Claim of Exemption & Supporting Affidavit re $833 Seizure includes James Parker's Affidavit of June 11, 2009, which affirms:

> 1. James Parker resides at 271 E. Cotati Ave, Cotati CA 94931 [along with] Michael Halliwell, who is legally bound to share equally in any adverse judgment for legal costs.
>
> 2. The reality of Defendants' cost sharing agreement has never been disputed by plaintiff or any judge. Michael Halliwell has

the same right that I do to defend against financial injury without Due Process of Law.

3. At no point in this litigation has the normal court process of noticed motion and a briefing cycle been available to Defendants. Charles Jensen's legal rationale for piling fee award upon fee award is that Defendants have somehow been in control of proceedings. This assertion is diametrically opposite to the true situation in this case.

4. I have no doubt that this $833 asset seizure is "small potatoes" for someone who earns $230 per hour, as Charles Jensen does. I believe the main reason for this harassment is to try to disrupt Defendants' preparation and prosecution of their appeals invoking their Fourteenth Amendment rights to Due Process of Law and Equal Protection under State Law.

5. At no time in these two years of proceedings has any judge of the Sonoma County Superior Court paid the slightest attention to Defendants' well documented charges of violations of the code of conduct for attorneys set forth in Business and Professions Code Section 6068(d). Since *Clark v Millsap* (1926) 197 Cal 765, 785, bars payment for an attorney's fraudulent activity, unresolved charges of misconduct against Charles Jensen are a sufficient basis for denying him any payment whatsoever.

> 6. Draconian confiscations of the sort cited above, amount to a total negation of the protections for debtors, which have existed in this country ever since the American Revolution. *Armstrong v Manzo* (1965) 380 U.S. 545, 552 and *Mathews v Eldridge* (1976) 424 U.S. 319, 333, require a meaningful hearing at a meaningful time, before anyone in this country can be deprived of any property. The fees awards piled upon prior fees awards in this case are designed as a punishment for Defendants' efforts to exercise their federal constitutional rights. There is simply no justification for any court's lending its support to this sort of intimidation. (Id. at 2)

Defendants' analysis of Judge Rushing's July 7, 2009 denial of James Parker's Claim of Exemption (Appendix at 410) notes that Parker's Affidavit of June 5, 2009 pointed out that his previously disclosed monthly wages (which were $345.99 in April 2009, when Charles Jensen's Writ of Execution was issued) and Unemployment Benefits (about $500 in that month) fully accounted for the money he was accumulating to pay for his share of rent and

expenses, when Charles Jensen cleaned out his Redwood Credit Union funds.

Judge Rushing repeatedly allowed Plaintiff's counsel to avoid stating his reasons for opposing a Claim of Exemption, as required by CCP section 703.560(b) other than "Claimant's citations are not applicable." After failing to secure Judge Rushing's approval of his excuse for not citing facts which justified his Opposition, because Defendant's Claim constituted "new vexatious litigation" barred by CCP sec 391, Charles Jensen's July 7, 2009 defense of his Opposition (see Appendix at 405-406) consisted only of his saying:

> But nowhere in the purported papers are there statutory claims that would be sustained for a Claim of Exemption, which is why my papers simply say that there is no stay. There is not. And that the citations are not applicable. They are not. And I'll leave it at that, Your Honor. (Transcript at 15:6-11)

Defendant James Parker's analysis of Judge Rushing's July 7, 2009 denial of his Claim of Exemption (Appendix at 407-408) cites the holding of *Betz v Pankow* (1993) 16 Cal.App.4th 931, 938:

> As a general rule, "the perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order ...." (§ 916, subd. (a).) The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided.

At the July 7, 2009 Hearing James Parker cited Judge Boyd's ruling on the applicability of CCP Sec 916(a):

> Judge Boyd in OEX hearings stayed those hearings as premature because he agrees federal appeals are relevant. (Transcript at 11:27 to 12:1)
>
> Judge Rushing responded on by saying:
>
> I believe he's wrong. I just have to say it. This is before me now. Each judge has to

> decide for themselves, and so I – I'm ruling against you on that point. (Ibid at 12:2-4)

Even though a successful appeal to the U.S. Supreme Court could overturn any of her fees awards on Due Process grounds, Judge Rushing argued at the previous hearing that this doesn't make any difference, with respect to the Sonoma County Superior Court's authority to immediately enforce an attorney fees judgment. Judge Rushing told James Parker: "You could file things to the U.S. Supreme Court if you want to. That has nothing to do with the enforceability of judgments here, because you only have one right of appeal; that's to the Appellate Division." (February 10, 2009 Transcript at 8:8-12)

In refusing to address governing precedents on the scope of CCP § 916(a) stay provisions, Judge Rushing implies that James Parker is not talking

about a substantive issue, and proclaims: "I don't have to give reasons." (July 7, 2009 Transcript at 13:11-12) James Parker argued: "Until our appeal is fully heard and fully resolved, the Court has no jurisdiction to act in this matter." (Ibid at 13:22-23) (See Appendix at 409.)

At the July 7, 2009 Hearing, James Parker made an unsuccessful request for a postponement to allow Defendants to cope with the problem caused by Charles Jensen's continuing evasiveness. He said:

> Well, Your Honor, you're – essentially Charles Jensen is saying because he claims citations are not applicable, we as pro pers have to research the law from A to Z to discover why they are not applicable. We say that he's required specifically ten days before a hearing goes forward, and the reasons for bringing this hearing, why Claimant's citations are not applicable. We did the same thing on the first $10,000 judgment. He said the – well, he said that – it didn't apply, but he didn't say why. [So], we need to ask for a stay. (Ibid at 15:23 to 16:5) (See Appendix at 413.)

Defendant James Parker then connected Charles Jensen's evasive approach to the July 7, 2009 hearing with Jensen's misconduct in earlier proceedings, which had been tolerated by Judge Rushing:

> And we have stated the reasonings in our – all our documents why we feel this court is very sympathetic to Mr. Jensen. And I do not want to embarrass the Court by going through that material, but the Court knows what that material is. And it would seem to me the Court would bend over backwards not to give that impression, but the Court continues never [requiring] Mr. Jensen to say anything in substantive response. All he does is spout vagaries, puffery, exaggerations, and he's never really been called on it. (Transcript at 18:6-14)

James Parker's Claim of Exemption (at 13) cited *Mann v Thalacher* (2001) 246 F.3d 1092, 1096-1097, which noted the "federal constitutional right to be tried before an impartial trier of fact." Judge Rushing became increasingly irritated as James Parker began to address this subject and referred to

past misdeeds of Charles Jensen, which have been extensively documented in the Case Record. James Parker continued: "We believe Mr. Jensen's guilty of fraud and perjury –" (Ibid at 18:14-15) Judge Rushing interrupted at this point with an exasperated "Okay." (Ibid at 16) James Parker resumed: "– and we've made that claim." (Ibid at 18:17) Judge Rushing again interrupted with an even more emphatic "Okay." (Ibid at 18:18) James Parker protested Judge Rushing's interruptions: "Your Honor, and you're trying to shut us down." (Ibid at 18:19-20) In his Claim of Exemption (at 12), James Parker had cited the basis for this protest, the "elementary requirements of impartiality taken for granted in every judicial proceedings" (affirmed in *Commonwealth Coatings Corp. v Casualty Co.* (1968) 393 U.S. 145, 148). But Judge Rushing would hear no more, saying: "That is now enough. I have been

more than patient. The motion for Claim of Exemption is denied. The hearing is over." (Ibid at 18:21-23) (See Appendix at 419-420.)

REASON FOR GRANTING CERTIORARI

The Appendix of Defendants' May 13, 2009 Notice of Appeal from the Vexatious Litigant Finding of April 17, 2009, criticizes the refusal of either Judge Rushing's fees awards, or the Appellate Branch rulings upholding them, to say anything at all about the relevant governing precedents or factual issues, by citing the U.S. Supreme Court's *Boddie v Connecticut* (1971) 401 U.S. 371, 375 opinion:

> It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this

> system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

As far as the Case File of *Paxinos v Halliwell & Parker* is concerned, this Notice of Appeal does not exist, because the most recent and the current Presiding Judges of Sonoma County Superior Court have both refused to allow the filing of anything, which challenges applications of Judge Beaupre's Order of April 17, 2009. If there is any flesh on the due process principle in this situation, now is the time take cognizance of another fundamental principle: "All that is necessary for the triumph of evil is that good men and women do nothing."

Supreme Court, U.S.
FILED

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No. 09-199

AUG 10 2009
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IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

APPENDIX FOR A WRIT OF CERTIORARI

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526, halliwel@csulb.edu

August 10, 2009

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FOREWORD

From the Defendants' perspective this two-year long litigation has consisted of wave after wave of assaults, by Plaintiff's attorney and the Sonoma County Court system, which hardly ever followed normal procedures and were never justified by caselaw. The wellspring (by Plaintiff's explicit admission, Transcript at 377:20 to 378:18) of this eviction lawsuit was an anonymous compilation of hearsay complaints evaluated by a Homeowner's Association hearing which Defendant was not allowed to attend. Judge Rushing said that she would explain why she allowed this document into evidence (Transcript at 442:8-10) but after Defendant Michael Halliwell accepted her offer (Transcript at 442:23-28), she changed her mind and declined to do so (Transcript at 447:24-25).

The denial of Defendants' rights was compounded by Judge Rushing's first disregarding Defendants' proposed jury instructions, then refusing to allow Defendants any input on this subject (Transcript at 169:18-23, 175:18-21). Judge Rushing further violated the Rule of Law, by completely ignoring California's strong Unruh Act (Civil Code Sec 51)

prohibition against arbitrary discrimination in rental housing in her jury instructions, and her refusing to allow any evidence on this subject (Transcript at 224:6-16).

For challenging Plaintiff's fabricated personal service claim and short-circuiting of the normal trial date setting process (Transcript at 443:3-7), which cost Defendants ten days of preparation time and any opportunity to compel discovery, Charles Jensen insisted upon an unreviewable $4,000 payment (even if Defendants were willing to voluntarily vacate the premises in dispute). Judge Rushing slammed the door on this aspect of the case, with a contempt of court threat (Transcript at 154:28 to 155:7).

For our challenges to her various rulings at trial, Judge Rushing added another $6,000 in attorney's fees. Judge Rushing's $10,000 fees award was first based on the false premise that "James Parker did not oppose the motion," and Judge Rushing then refused to state any reason at all for her fees award (at her September 25, 2008 hearing). A whole year of bitter procedural controversy ensued due to Judge Rushing operating off the record and without even a

semblance of jurisidiction, to turn over $10,000 of Defendants' funds to Charles Jensen.

Exactly one year after Judge Rushing made her unexplained fees award, Sonoma County Superior Court's Appellate Branch upheld it (also without any explanation) on September 25, 2008. The various evasions which were the basis for enforcing the $10,000 fees award (contrary to governing precedent, even if the award itself were valid), including acting without the September 25, 2007 hearing transcript and refusing to respect Defendant Halliwell's right to appeal (pursuant to CCP Sec 902), became the basis for a detailed documentation of the history of the case by Defendants. Without citing ANY written or oral work product, Charles Jensen sought $20,720 for **only reading** Defendants' documentation, and Judge Rushing awarded him every penny he asked for. While Defendants were still appealing Judge Rushing's $20,720 fees award, she granted Charles Jensen another $19,000 in attorney's fees.

On February 17, 2009, Defendants sought a Writ of Mandamus from the California Supreme Court to try to untangle the procedural Gordian knot, which had prevented adjudication on the merits (Charles

Jensen said NOTHING at all in his defense at any hearing) of any aspect of the case. Before any action was taken on this petition (S170538), Defendants appealed Judge Rushing's $19,000 fees award. The State Supreme Court then transferred S170538 to the Court of Appeal, which promptly ruled against Defendants (without addressing the applicability of the *Hagan* case, in light of which it was suppose to examine Defendants' petition.

Defendants updated their proposed relief in light of the "three front" situation created by the $19,000 attorney fees award and premature enforcement of the $20,720 attorney fees award. This eliminated the "substantially identical" basis for the *Hagan* remand, and the California Supreme Court assigned a new case number (S171792) to our April 3, 2007 renewal of our Petition for Mandamus.

The State Supreme Court did not act until our updated procedural remedies had become obsolete, then denied review on May 13, 2009. A multi-front squeeze still obstructs Defendants' appeals; its most recent culmination is documented in our extensive analysis of Judge Rushing's July 7, 2009 Claim of Exemption Hearing Transcript.

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

First District
Court of Appeal
Division Two
Case # A123266

CALIFORNIA SUPREME COURT S170538

Sonoma County
Case # MCV 191306

Michael Halliwell, et al,
Petitioner vs.

Superior Court of
California, County of
Sonoma, Respondent;

Chrysanthe Paxinos,
Real Party in Interest

FILED FEB 17 2009
Clerk Supreme Court

Defendants/Appellants' Reply to Second Front Tactics by Real Party: Petition re Corrective Mandamus Pursuant to CCP Sec 1086

The impetus for this filing is what amounts to a Fourth and Fifth Front in the ongoing campaign by Judge Elaine Rushing and Charles Jensen to disrupt Defendants' ability to effectively appeal prior fees awards. The Fourth Front is the accompanying $19,000 fees award (granted on February 10, 2009), whose briefing schedule overlapped Supreme Court briefing and OEX proceedings. Defendants tried to delay the hearing on the $19,000 fees motion with their Supersedeas Petition of January 3, 2009 and Stay Motion of January 9, 2009 (which were ignored by Sonoma County Superior Court Presiding Judge Knoel Owen and Appellate Branch Presiding Judge

Rene Auguste Chouteau). The Fifth Front is the accompanying February 9, 2009 Order by Judge Rushing, that Defendants show cause that they should not be classified as "vexatious litigants" (and subjected to the penalties associated with this status). Because of the monopoly of the California Supreme Court on the discipline of attorneys and judges, it would not be appropriate to direct this Mandamus Petition to any other court. This petition documents the substantial Federal component of nearly all of Defendants' grievances, and seeks protection from deliberate interference with Defendants Federal right to appeal Federal claims left unprotected by State courts.

Dated this 17th day of February, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

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Overview of Motivations and Effects of Evasive Tactical Maneuvering

A. Bias and discrimination against Defendants in pretrial proceedings

The most important federal issue in Defendants' case in *Paxinos v Halliwell & Parker* was the Covenants, Conditions & Restrictions (CC & Rs) of the Meadow Pines Homeowner's Association which made tenants second-class citizens in their dispute resolution process. Homeowner's were allowed to initiate "Star Chamber" proceedings which tenants were not allowed to attend (unless the landlord was willing to attend with the tenant). This denied tenants their Sixth Amendment Right to confront their accusers and be given notice of the nature of charges against them. These assaults on the Bill of Rights are every bit as pernicious as the restrictive racial covenants which the U. S. Supreme Court invalidated by invoking the Fourteenth Amendment in

Shelley v Kraemer (1948) 334 U.S. 1, 14: "*The amendment makes void state action of every kind which is inconsistent with the guarantees therein contained in the 14th Amendment and extends to manifestations of state authority in the shape of laws, customs, judicial or executive proceedings.*" California has no more authority to adopt Unlawful Detainer laws which shield from inquiry the underlying discrimination which is the basis for an eviction, than its voters had to adopt Proposition 14 which proclaimed: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part of or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." (See *Mulkey v Reitman* (1966) 64 Cal 2d 529, 538.) Also, Defendants' second-

class citizenship for tenants grievance is squarely supported by this holding in *Shelley v Kraemer* (1948) 334 U.S. 1, 20: "*The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.*" *Romer v Evans* (1996) 517 U.S. 620, 633 affirms that equality requires impartiality: "*Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.*"

Faced with an "open and shut" Federal Constitutional defense against what Plaintiff would later testify was his sole basis for issuing his 60-Day Notice to Quit (Transcript at 378:3-18), Charles Jensen

engaged in a series of misrepresentations and evasive tactics (which were aided and abetted by various rulings by Judges Nadler and Rushing). Charles Jensen severed all communications with Defendants (which later violated the meet and confer obligation of a party opposing an ex parte motion, pursuant to Local Rule 5.7D). This refusal to communicate precluded any informal resolution of discovery disputes (thereby violating California Attorney Guideline of Civility and Professionalism #9), and blocked recourse to compulsory disclosure motions (which require a "meet and confer" certificate pursuant to CCP Sec 2016.040). In spite of numerous protests about violations of statutory requirements and Local Rules by Charles Jensen, the trial court resolutely refused to address ANY of these complaints. In fact, the ONLY access which Judge Nadler would allow in pretrial proceedings, was an

ex parte application procedure that involved NO oral argument and NO opportunity for a written reply to false statements made in opposing declarations.

There is a huge difference (a five day deadline for answering versus fifteen days) between notification of an unlawful detainer action in person, and by mail. Charles Jensen claimed an entirely fabricated personal service on James Parker on 7:45 PM on June 2, 2007, and an equally bogus conversation claimed by the process server to have explained substitute service on Michael Hallivell. Defendants KNEW such claims were outright perjury (which they unequivocally challenged in their answer forced by the ostensible means of service). Defendants challenge to the validity of service was a special appearance pursuant to *The 1880 Corporation v Superior Court* (1962) 57 Cal 2d 840, 843 and *Pease v City of San Diego* (1949) 93

Cal.App.2d 706, 710-711. Subsequent judicial rulings which evaded the PERJURY aspect and classified Defendants' Answer as a "General Appearance" which "waives service defects" call into question the commitment to the rule of law of the judges making such rulings.

Sonoma County's practice of setting an Unlawful Detainer trial date without any opportunity for input by the tenant would have been illegal under the pre-consolidation Municipal Code (which nearly all counties continue to follow). It is certainly unfair, since tenants are encouraged to rely on procedures set forth on the California Court's Online Self Help Center (www.courtinfo.ca.gov/selfhelp), by the Summons they receive in Unlawful Detainer actions and a poster in Room 107J of the Hall of Justice. When Defendant Michael Halliwell challenged the fairness of the Sonoma County trial date

setting process, he was threatened by Judge Nadler with a Contempt of Court sanction. (Transcript 16:15 to 17:1) The ONLY mention of this aspect of the case in any judicial ruling in *Paxinos v Halliwell & Parker*, does not acknowledge the apparent practice of giving the landlord the first available trial date, and says only "there were no apparent irregularities." Since the Sonoma County trial date setting process operates (in tandem with very short statutory discovery deadlines) to eliminate all but voluntary discovery, it helps to explain an observation made to defendants by a mediator in the conciliation process, that "no tenant has ever been able to prove a retaliatory eviction" in Sonoma County Superior Court. In any event, such a "fact-free" approach to difficult-to-prove questions of prohibited motivation, vitiates the intent of the Judicial Council manifest in their UD-106 Form Interrogatories, and violates the

Federal "meaningful hearing" mandate of *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552.

B. Bias and discrimination against Defendants in jury trial proceedings

From the moment reference was made (in Plaintiff's March 28, 2007 60-Day Notice to Quit) to a March 26, 2007 Report on alleged "ongoing threatening behavior" by Defendant James Parker, we used every available avenue to try to obtain this document. Both Charles Jensen and the Homeowner's Association refused to provide this Report, and Judge Rushing totally vitiated the Rules of Evidence to bring a redacted version of this anonymous compilation of hearsay complaints before the jury. In proceedings before Judge Nadler, Defendants tried to pre-empt introduction of any evidence within the scope of Form Interrogatories 71.7 & 77.1

(relating to complaints against tenants and the landlord's reasons for eviction), which Charles Jensen brushed aside with the terse remark "this isn't the law." Defendants' "Motion to Strike No-Notice Anonymous Evidence" was put on the back burner by Judge Rushing, who proclaimed: "I never have jurors outside waiting. This is not the time to do this. That's not what we do to jurors." (Transcript at 316:24-26) When Exhibit #5 (containing a redacted version of the March 26, 2008 Report, whose only indication of its authorship said "This was submitted by a neighbor") was admitted into evidence as part of a document dump, Defendant Halliwell complained: "They just dumped a pack of letters, undifferentiated, saying here's 24 letters, plop." (Transcript at 242:27-28) Judge Rushing had apparently looked at Defendants' papers during testimony and ruled: "Okay, Mr. Halliwell, I have

looked at your motion this morning, and I'm denying it. It's in evidence. It's going to remain in evidence, and that's my ruling. We do not need a sidebar." (Transcript at 343:27 to 344:2)

Judge Rushing's willingness to admit an anonymous compilation of hearsay complaints (with redactions blotting out all the names included in the original report) violates the fundamental purpose of Evidence Code Sec 1200. Thus Witkin notes in California Evidence: "The purpose of the 'hearsay rule' is to preserve a party's Sixth Amendment right to confront and cross-examine an adverse witness and to disallow testimony coming from a witness who is not under oath and whose demeanor cannot be observed by the trier of fact." When faced with a much less flagrant violation of hearsay rules in *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1364-1365, the California Supreme Court rejected

elevating speed of adjudication over substantial justice, and cited *Hernandez v Superior Court* (2004) 115 Cal.App.4th 1242, 1246, which affirms that "the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency."

Defendants tried to mitigate the damage arising from Exhibit #5, by attempting to thoroughly examining it in court. However, when Defendants had dealt with 16 of the 39 lines in this Exhibit (involving five redacted names, four of which were exactly the same length), Judge Rushing interrupted Defendant Halliwell: "Actually, sir, I have the right to control the means and the manner, and also there's an Evidence Code Section called 352 which prevents repetition and cumulative evidence and things that are more time consuming than probative. The jury is only here for a limited time. We need to

get through the rest of this case." (Transcript at 355: 20-26) Michael Halliwell responded: "Considering the critical nature of this document [Exhibit #5], I'd like to be able to go through it line by line. Are you ruling that out?" (Transcript at 355:27 to 356:1) Judge Rushing answered: "**I am.**" (Ibid at 356:2)

When Michael Halliwell asked James Parker how he felt about being denied the protection of the rules of evidence embodied in the Sixth Amendment, Judge Rushing blocked any further discussion of the unreliable nature of accusations made by unknown persons, by ruling "It is irrelevant." (Transcript at 351:18) In an effort to appeal to the fundamental fairness of jurors, Michael Halliwell said (in a tone of voice that left little doubt as to whether he thought judicial prerogatives should take precedence over the Bill of Rights): "The Sixth Amendment is irrelevant. Fine." (Transcript at 351:19) This invocation of the

Bill of Rights drew a stern rebuke from Judge Rushing: "You know what, Mr. Halliwell, I'm going to stop you from making those comments any more in this courtroom. When I make a ruling that something is irrelevant, you don't comment to the jury that the Sixth Amendment is irrelevant, and I consider that contemptuous behavior. I won't tolerate it." (Transcript at 351:20-25) Judge Rushing's use of contempt of court threats to cut off a legitimate legal argument is contrary to *Baugess v Paine* (1978) 22 Cal 3d 626, 638.

At one point in proceedings, it looked like Judge Rushing might clarify her totally evasive handling of the admissibility of the second- and third-hand hearsay complaints in Exhibit #5. Judge Rushing said to Plaintiff's counsel and the Defendants: "We are going to stay on the record to permit the parties to place on the record anything that was

said at side bar that wasn't argued on the record." (Transcript at 442) Michael Halliwell raised a number of rulings for which he sought clarification, and Charles Jensen expressed his own concerns (Transcript at 442-445). However, after Judge Rushing addressed the other issues mentioned, she continued to avoid the anonymous/hearsay issue, and concluded by saying: "I'm not making any further rulings than that." (Transcript at 446-447)

Charles Jensen's obstructionist tactics which prevented any discovery, morphed into an attack on Defendants' right to a jury trial which eventually wiped out Defendants' right to contribute to jury instructions. Plaintiff's main thrust was a no-notice motion for summary judgment (in violation of the 5-day notice requirement of CCP Sec 1170.7). It turned out Defendant Halliwell was well enough versed in governing precedents relating to State and Federal

protection against arbitrary discrimination to cite *Marina v Wolfson* (1982) 30 Cal. 3d 721, 730 and *Mulkey v Reitman* (1966) 64 Cal 2d 528, 538 and codification of these holdings in AB 1400 (effective January 1, 2006). All that Charles Jensen could offer in response was his assertion that any application of *Marina*, beyond discrimination against children, was illegitimate. Judge Nadler took Jensen's summary judgment motion under advisement, and never did rule on it. Charles Jensen declined Judge Nadler's invitation to renew his motion before Judge Rushing (which he never did, perhaps because he no longer had the element of surprise working for him).

After winning only a draw on the constitutional law front, Charles Jensen suffered a reversal when Judge Nadler retreated from his initial ruling depriving Defendants of a jury (on the ground that they had put the address of their residence in the

wrong part of their UD-150 counter request). It required a lot of effort from Defendants to prepare a persuasive motion to restore their jury, and they were bewildered by Judge Nadler's ruling that they should have found time to also prepare proposed jury instructions in anticipation of the success of their reconsideration motion. (See Transcript at 35:16-22) It turned out that the real reason Defendants were deprived of nearly 72 hours of the normal preparation time for jury instructions, which they were entitled to under Local Rule 4.10(H)(1), was to enable Judge Rushing to depart four hours before the normal court closing time of 4:00 PM on Friday June 22, 2007. Defendants turned in their proposed jury instructions at Judge Rushing's courtroom a few minutes before the 12:00 noon deadline established by Judge Nadler. The security guard was locking up the building at that time, and

apparently Defendants' proposed instructions were left on Judge Rushing's desk for her consideration on the following Monday morning, June 25, 2007.

Although Charles Jensen had said he accepted the restoration of Defendants' right to a jury, he introduced a second motion to take away their jury on the ground of alleged format defects in Defendants' proposed instructions. Judge Rushing went along with Charles Jensen's attack on the format of Defendants' submission. Judge Rushing said: "They are in some form of a legal treatise, but they're not – they're not BAJI. They're not CALJIC." (Transcript at 166:23-25). Judge Rushing ruled that the lack of a timely submission by Defendants in the proper format constituted "a waiver of their right to submit anything in the form of a written statement to be read or the jury instructions. That time has come and gone." (Transcript at 169:21-23)

As far as the jury could tell from the instructions crafted by Charles Jensen and Judge Rushing, the Unruh Act did not exist, and only the single act of issuance of the 60-Day Notice was a fit subject for examination for retaliatory intent (not the decision to bring an Unlawful Detainer lawsuit, nor the decision to actually evict the tenants, which are explicitly affirmed in Civil Code Sec 1942.5 as relevant decisional benchmarks). Judge Rushing ruled that the jury could not consider whatever role was played by Mr. Paxinos in post-notice concealment of the nature of complaints against James Parker. She said: "Well, his actions taken since the notice are irrelevant." (Transcript at 278:28 to 279:1) Also, Judge Rushing applied a double standard to the concept of hearsay evidence, having accepted everything Charles Jensen included in his document dump, but rejecting opinions favorable to James

Parker, with a clearly identified source. Michael Halliwell asked James Parker (Transcript at 299:21 to 300:6) about a communication to him by "Chris and Christine, the people who lived next door to me." But James Parker was not allowed to answer this question: "Did either of these people ever communicate with you that they received any satisfaction on this basic [noisy neighbor] grievance? Charles Jensen interrupted at this point, saying: "Objection, Your Honor. Any response will be hearsay." Judge Rushing responded: "Sustained."

Michael Halliwell tried to ask James Parker whether "there was any avenue whatsoever for you to get your side of this [complaint] into the hands of the Homeowner's Association before they made their decision on this matter?" (Transcript at 285:4-7) Charles Jensen prevented James Parker from answering by intervening: "Objection, Your Honor.

Relevance." (Transcript at 285:8) Judge Rushing ruled: "I'm going to sustain the objection." (Transcript at 285:9) Michael Halliwell asked landlord Gus Paxinos: "In exercising your right to elect to allow me to stay or not to stay, did you make any inquiries whatsoever from any source whatsoever about any characteristic whatsoever of Michael Halliwell? (Transcript at 224:6-9) Charles Jensen intervened: "Objection, Your Honor. Relevance." (Transcript at 224:10) Judge Rushing ruled: "**Sustained.**" (Transcript at 224:11) Michael Halliwell responded: "I'm asking him about his decision making process, this is a discrimination case, and I don't understand how it could possibly be irrelevant [asking] how he is exercising his discretion." (Transcript at 224:12-15) Judge Rushing replied: "**I'm sustaining the objection.**" (Transcript at 224:16)

The broad scope of Judge Rushing's evasions and obstructionism in the course of trial proceedings makes this long-standing governing precedent highly relevant: "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (*Sunday Lake Iron Co. v Wakefield Township* (1918) 247 U.S. 350, 352)

C. Maneuvers to evade the underlying merits of $10, 000 attorney's fees award

Judge Rushing made two important gestures toward even-handedness at the outset of post-eviction proceedings relating to attorney's fees. 1) She continued Judge Nadler's policy of allowing either Defendant to handle any aspect of the case, and took

cognizance of Defendant Halliwell's motion to postpone a July 31, 2007 fees hearing (in spite of Plaintiff's challenge to Halliwell's standing to bring this motion) and granted the motion. 2) She acknowledged (in her Order of July 12, 2007) the applicability of Local Rule 2.2D to every phase of an Unlawful Detainer action, and vacated a Tentative Ruling she issued in violation of this principle. However, Charles Jensen continued his evasions by filing, without notice to Defendants, a July 3, 2007 document whose letter of conveyance (CR-176) stated that it was an unfiled negotiating instrument, and promised an endorsed-filed copy, if it were filed after negotiations proved unfruitful. After Judge Rushing postponed the fees hearing until August 28, 2007, Defendants urged Charles Jensen to either comply with Local Rule 18.8 with respect to his July

3, 2007 fees motion, or submit whatever revised motion he considered appropriate.

When Charles Jensen refused to unambiguously bring a fees motion before the court as required by Local Rule 18.8, Judge Rushing did a 180 degree reversal on the standing issue, and retroactively invalidated all of Defendant Halliwell's fees-related filings. Judge Rushing ignored James Parker's 52-page August 22, 2007 Opposition to ANY attorney fees award, and granted a default judgment for $10,000 on the basis that "James Parker did not oppose the motion." When Judge Rushing (in her Order of September 5, 2007) vacated her improperly issued Tentative Ruling of August 28, 2007, awarding Charles Jensen $10,000, she barred James Parker from filling in any alleged gaps in his prior filings.

It was blatantly obvious that there was no

more supporting authority, nor even good faith judicial reasoning, behind Judge Rushing's handling of the fees issues, than in her rulings on jury instructions or applications the Rules of Evidence. A period of deadly maneuvering ensued, wherein Defendants did their best to avoid some sort of procedural default, and Charles Jensen retreated into total superficiality in his sparse filings and statements at hearings. The focus of this maneuvering was the status of a judgment announced by the court, but not signed and served on the parties. Defendants followed the holding of *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997, and the liberal construction of Notices of Appeal in favor of their sufficiency mandated by CRC Rule 8.750(a), that a notice of appeal is effective when filed after a court announces its intention to award a judgment, but before the court's order is promulgated. They filed a

Notice of Appeal on August 29, 2007 from Judge Rushing's initial $10,000 attorney fees award, and on September 26, 2007 from Judge Rushing's September 25, 2007 ruling from the bench that she intended to reinstate the $10,000 award. The sufficiency of the first of these Notices was later challenged by Charles Jensen on the basis that it was too soon, and the second notice was challenged because it was signed by only Defendant Halliwell (notwithstanding *Ehret v Ichioka* (1967) 247 Cal. App.2d 637, 640-641, which holds that signing a notice of appeal is a ministerial act which one co-defendant can perform for another).

Charles Jensen was able to succeed (in Judge Rushing's eyes) at a November 20, 2007 Claim of Exemption hearing in circumventing the automatic stay provision of CCP Sec 917.1(d), for judgments consisting only of attorney's fees and costs, pursuant

to *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655. Judge Rushing ruled that Charles Jensen's bare statement that this statute and precedent "does not apply to James Parker" was a sufficient statement of pre-hearing grounds for opposition, and that James Parker was not allowed to file any supplementary argument once he found out at the hearing that the alleged invalidity of Defendants' August 29, 2007 and September 26, 2007 Notices of Appeal was the reason that *Ziello, supra,* was no bar to immediate enforcement of Judge Rushing's $10,000 fees order. James Parker asserted that he was entitled to supplement his pleadings once he found out what Charles Jensen's reasons for opposition were. This is confirmed in CCP Sec 703.580(a) and Sec 703.580(c), but Judge Rushing proclaimed on this issue at the November 20, 2007 hearing that James Parker was "Wrong. Wrong sir. Wrong. I just told you the only

pleadings on a claim of exemption are the claim of exemption and the opposition and that's it." (Transcript at 481:15-21)

Judge Rushing never sent a signed copy of her September 25, 2007 fees award to the parties, and when Charles Jensen obtained a copy from the case file to secure a writ of execution on the $10,000 award, he did not inform Defendants of what he was doing (nor did he ever send a signed copy of the September 25, 2007 Order to Defendants). Because the unserved September 25, 2007 Order was still within the 90 day appeal deadline under CRC Rule 8.751(a)(3), Defendants filed a renewed Notice of Appeal on November 21, 2007, and a Claim of Exemption noting that they had eliminated Judge Rushing's basis for avoiding the mandate of *Ziello*, *supra*. Since Charles Jensen did not renew his opposition to Defendants' Claim of Exemption, we

concluded that he couldn't think up any ground why *Ziello supra*, should not be given full force and effect.

Defendants checked the Case File in early December 2007, and found nothing to indicate that any action had been taken to oppose or circumvent their November 21, 2007 Claim of Exemption. However, there were a couple of subtle "adjustments" which Defendants did not notice. Judge Rushing (without any supporting Proof of Service) caused this bogus entry to be placed in the 11/07/2007 electronic docket: NOTICE OF ENTRY OF JUDGMENT SERVED 9/25/07. Judge Rushing also completely scrubbed any mention of the reason for her November 20, 2007 invalidation of Defendants' Claim of Exemption from her Courtroom Minutes of this date. Most of the 22 lines in the Minutes describe the date of the hearing and those who attended, the only substance is the top line "ISSUE: CLAIM OF

EXEMPTION" and the last line saying: "Court DENIES Claim of Exemption of Defendant James Parker." At the January 24, 2008 Appellate Branch Hearing, Charles Jensen made a remark which suggested that the Sheriff had turned over Defendants' $10,000 to him. After several hours of discussion, the Sheriff's Department confirmed this, but refused to give any details. It was not until May 7, 2008, that the Sheriff's Department was willing to provide a written record of what Judge Rushing had done. As it turns out Judge Rushing acted on **November 26, 2007** to turn over Defendants' $10,000 (five days after Defendants' Notice of Appeal had deprived her of any jurisdiction to act in this matter).

D. Maneuvers to evade the underlying merits of $20,720 "Reading Fee" award

Judge Rushing has never cited a justification

for any of her fees awards. At the May 6, 2008 attorney fees hearing, Judge Rushing brushed this whole subject aside by saying that the existence of an attorney fees clause in the rental agreement automatically covered any time spent by the prevailing party's attorney (without making the slightest connection to the specific limitations of the attorney fees clause, which James Parker agreed to). The State Legislature has ruled out this sort of approach, as *Hsu v Abbara* (1995) 9 Cal 4th 863, 873-874 notes: "In 1987, the Legislature amended [Civil Code] section 1717 to its current form. (Stats. 1987, ch. 1080, Sec 1, p. 3648.) The Legislature replaced the term "prevailing party" with the term "party prevailing on the contract," evidently to emphasize that the determination of prevailing party for purposes of contractual attorney fees was to be made without reference to the success or failure of

noncontract claims. (See, e.g., On v Cow Hollow Properties (1990) 222 Cal.App.3d 1568, 1574.)"

Not only did Plaintiff never prove a contract violation, he abandoned his attempt to show ANY cause "because the code section says no cause is needed" (see June 25, 2007 Transcript at 172:25 to 173:3). This issue is very simple, a landlord can rely on his right to evict at will to win an Unlawful Detainer action, but he cannot then asked the evicted tenants to pay him, when the rental agreement (clause #13) allows attorney's fees only "to enforce any part of this agreement." James Parker's supposedly non-existent August 22, 2007 Opposition (CR-416) to ANY fees award cites *Walters v Marler* (1978) 83 Cal.App.3d 1, 27-28 quoting *McKenzie v Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89-90 rejecting the idea that the Legislature in enacting Civil Code sec 1717 meant to include "all provisions

in the contract allowing attorney's fees, whether or not those fees are incurred to enforce the provisions of the contract." It states that the only reasonable interpretation of section 1717 is "the allowance of attorney's fees only when such fees are incurred to enforce the provisions of the contract."

Judge Rushing's gag rule (based on Defendant Michael Halliwell's alleged lack of standing) is an assault on Defendants' right of self representation affirmed in *Faretta v California* (1967) 422 U.S. 806, 812-813 and the mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423 "regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.'" Defendant Halliwell could not get a word in edgewise, with respect to Judge Rushing's edict silencing him: (Michael Halliwell: "Could I address it?" Judge Rushing: "No. I'm talking to Mr.

Parker." (Transcript at 466:21-22)) Judge Rushing's gag rule was imposed with only this tenuous reference to supporting authority: "The statements I have just made are in the law library in all the practice books." (Ibid at 466:24-25) Judge Rushing then turned to Defendant Michael Halliwell and said: "And I am sorry, Mr. Halliwell, I'm not going to permit you to say anything in this argument at this hearing." (Ibid at 466:28 to 467:2) Michael Halliwell responded: "Not even on the central issue on whether I should be allowed to speak?" (Ibid at 467:3-4) Judge Rushing replied "No, it's the same rule." (Ibid at 467:5) Michael Halliwell continued: "Well, I believe Your Honor is mistaken. I object for the record." (Ibid at 467:6-7) Judge Rushing terminated the discussion: "Mr. Halliwell, I've just made my ruling." (Ibid at 467:8)

At the May 6, 2008 hearing, Judge Rushing

ruled: "I will permit you, Mr. Parker, to make whatever arguments you wish, but not Mr. Halliwell." James Parker responded: "Since the Court has never cited any case law as to why Michael Halliwell has not been allowed to speak, I would ask the Court to cite some case law as to why not." But Judge Rushing ruled: "I am not required to do so and I decline that request." (Transcript at 4:21 to 5:14)

James Parker's Affidavit re Judge Rushing's May 5, 2008 Tentative Ruling says:

> Charles Jensen's demand for $20,000 in fees for having to read the "irreverent dribble" produced by Defendants, because, "even a blind pig can find a truffle every now and then" was times for maximum disruption of Defendants' appeals to the First Circuit Court of Appeal and the California Supreme Court. In their April 30 (1:02 PM), 2008 Petition to Presiding Judge Knoel Owen to Postpone the May 6, 2008 Hearing on Attorneys Fees, Defendants argued that before any award of fees for opposing Defendants' appeals should be considered, the appeal briefing schedule

> abrogated by the order of February 5, 2008 should be reinstated and completed. When this motion was filed (which cost $20), arrangements were made for a decision to be placed in Box 73 in the Hall of Justice. We checked on the morning before the scheduled May 6, 2008 hearing, and found that our motion was still pending. Since we filed copies of our California Supreme Court filings around 9 o'clock in Room 107J, we hoped that the obvious conflict between preparing these materials and preparing for the May 6th hearing might incline Presiding Judge Owen to grant our request for a postponement. [However, no action was ever taken on Defendants' April 30th motion.]

The timing and scope of the $20,720 fees hearing on May 6, 2008 was a deliberate effort to interfere with and punish Defendants' efforts to appeal a prior attorney's fees award. Such reprisals are contrary to federal policy, for reasons which are fully applicable to State legal proceedings. Thus, *Webster v Sowders* (1988) 846 F.2d 1032, 1040 observes: "Just as it appears clear that a trial judge cannot sanction a party or lawyer for taking an

appeal, we do not believe that it is proper here for the District Judge to threaten to sanction the defendants or their attorney for filing a motion to stay his order pending appeal on the grounds that the underlying appeal is frivolous. The only purpose of such a threat is to prevent an appeal. Appeals of district court orders should not be deterred by threats from district judges."

Defendants' Appendix re May 6, 2008 Transcript (5:8-14) states:

> In his October 27, 2008 Reply Brief (at 9:18-19) Charles Jensen asserts: "There has been no intent on the part of counsel to rob these litigants of due process." This is a reference to James Parker's protest at the May 6, 2008 hearing that Charles Jensen "brought a two-pronged attack against us" in deliberately timing his $20,720 fees motion so that it would reach a critical juncture when defendants faced crucial filing deadlines with respect to Judge Rushing's earlier award of $10,000 in attorney's fees (Transcript at 6:8-10). Plaintiff's co-counsel Kadin Blonski responded "we're under no obligation to time our motions to go along with whatever they

have going on." (Transcript at 9:18-20) Mr. Blonski also added this false statement in support of his two-pronged tactic." "There's been no motion at all for a continuance other than what was just made orally." (Transcript at 9:14-15) Charles Jensen knew this to be false because he received a copy of Defendants' April 30, 2008 Petition to Postpone May 6, 2008 Hearing on Attorneys Fees (CI 3710-3714). (See Item #8 of Transcript Analysis.)

At the May 6, 2008 hearing James Parker protested to Judge Rushing: "But the point here is he's never – he's never controverted with law any of the citations that we have – that we've briefed him on. All he said is they're dribble [Jensen's exact word], nonsense and whimsy; so I would like to ask the Court to ask him what percentage of those citations that were issued – what fraction are whimsy, dribble and nonsense?" Judge Rushing replied: "Okay, Mr. Parker, I'm not going to ask that question." James Parker continued: "One last thing, then. Okay. I would like to ask one more question.

Can he now cite any one citation that's whimsy, dribble and nonsense?" Judge Rushing replied: "I'm not going to force him to do that." James Parker then complained: "Defendants take exception to that because all he's – essentially all his argument is it's all garbage. He's never controverted a single one of our citations, and they are scholarly, and they're well documented." (Transcript at 17:9-24)

Defendants' Appeal Reply Brief re the $20,720 fees award notes:

> There is not a single instance in any transcript, Courtroom Minutes, or ruling by Judge Rushing which in any way addresses Defendants' documented complaints about the evasive and sometimes illegal tactics used by Charles Jensen. Nor does Charles Jensen cite a single instance in his own brief of any allegedly false charge made by Defendants. Charles Jensen's only reply to the misconduct charges he wants to be paid for reading, is that it does indeed take many pages to establish the context, set forth Respondent's various sneaky maneuvers and cite caselaw which precludes this sort of behavior.

Defendants' Appeal Reply Brief re the $20,720 fees award notes: "Charles Jensen concedes that Defendant Michael Halliwell is adversely affected by any attorney fees award to Plaintiff (Opposition at 3:9-11), as he dismissively observes: 'as they state ad nauseam throughout their papers they apparently have some sort of arrangement between them for Mr. Halliwell to pay ½ of the judgments and orders in this case.'" Having fully satisfied the injury-in-fact requirement and closeness of relationship requirement (having been evicted together), Defendants also satisfy the third *jus tertii* requirement of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114: "*The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.*" To try to deal effectively with aspects of the case previously

handled by Defendant Halliwell, within the framework of Judge Rushing's ruling on standing, James Parker asked: "May I call Dr. Halliwell as a witness?" (Transcript at 473:3-4) Judge Rushing refused to allow this, saying: "No, this is not – live testimony is not permitted at Law & Motion. No witnesses testify at Law & Motion." (Ibid at 473:5-7)

The Appellate Branch ignored the mandate of *Warth v Seldin* (1975) 422 U.S. 490, 504, that the indirectness of an injury does not preclude standing. Moreover, even if Michael Halliwell and James Parker were not co-defendants, Halliwell would be allowed to defend his own interest in mitigating any fees award against Parker under the standing criteria set forth in *Powers v Ohio* (1991) 499 U.S. 400, 410-411. This unfairness was greatly aggravated by sweeping aside Defendant Halliwell's undeniable standing in the appeal process to challenge Judge

Rushing's standing ruling. *Aries Development Co. v Coastline Coastal Zone Conservation Commission* (1975) 48 Cal.App.3d 534, 542, and its supporting authorities specifically hold that the right to appeal directly accrues from a trial court's ruling that a party lacks standing with respect to a motion. Also, in addition, *United Investors Life Insurance Co. v Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303-1304, cites *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736 and numerous other authorities in support of its holding that "an appellate court has *jurisdiction* to determine whether a party has standing in prior proceedings. Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure Section 902." *Conservatorship of Stewart* (1969) 276 Cal.App.2d

211, 215 sums up: "In other words, *a party is 'aggrieved' by an order, within the meaning of section 902, even if his grievance turns out to be legally without merit.*"

E. Protecting Defendants' appellate rights from the latest overload tactics

Defendants' February 2, 2009 Petition sought a preliminary ruling from Sonoma County Superior Court Presiding Judge Knoel Owen on whether Appellate Branch Presiding Judge Rene Auguste Chouteau should play a role in deciding on the Petition for a Writ of Supersedeas, which Defendants intended to submit. The February 2nd Petition raised the issue of what Defendants feel has been Judge Chouteau's obstructionism in appeal scheduling matters (such as his pulling the plug on scheduled appeal briefing on February 5, 2008 and not reinstating briefing until May 13, 2008). On

February 3, 2009 Defendants filed their Supersedeas Petition, which sought cancellation of a February 10, 2009 Fees hearing (on the ground that its briefing schedule overlapped a period of time when Defendants were fully occupied with Appeal and OEX matters). Both Petitions thoroughly reviewed Defendants' California Supreme Court filings to demonstrate the strong Federal component of most of Defendants' grievances. (Thus, however pending decisions by the California Supreme Court on whether to grant review are resolved, Defendants face a very substantial preparation and drafting task in seeking to protect their federal rights, in whatever forum remains open). No action was taken on the February 2nd or February 3rd Petitions. Defendants attempted to file their February 9, 2009 Motion for a Stay of Trial Court Proceedings (which added numerous citations of federal caselaw in support of

their various grievances, and reasserted Defendants' right to cancellation of the February 10, 2009 fees hearing, which sought to impose a severe ($19,000) penalty on Defendants for devoting their attention to protection of their Federal rights). Apparently, Judge Rushing has asserted the notion that (in the sensitive situation created by her prior conduct in the case) she should be the sole arbiter of when to schedule further fees motions. The filing clerks in Room 107J departed from their established practice of accepting extraordinary petitions for consideration by whatever judge(s) were later determined to be appropriate. In this instance they insisted on deferring to Judge Rushing on the disposition of Defendants' February 9th motion. Judge Rushing decided that the February 9th motion to cancel the February 10, 2009 Fees hearing, be placed on her

March 24, 2009 Law & Motion calendar, thereby completely defeating the purpose of the motion.

At the February 10, 2009 Fees Hearing Judge Rushing expressed the view that Judge Boyd was wrong to have suspended OEX proceedings, and that the discretionary review part of the appeals process involved no rights for an Appellant. Therefore her trial court need not make any accommodation to protect an Appellants' optional rights. The February 10, 2009 Fees Hearing started off with a protracted battle occasioned by Judge Rushing's insistence that even a motion (attached) premised on a court's alleged lack of jurisdiction had to be placed on the Law & Motion Calendar in the usual fashion, in order to receive consideration. In fact, a court should NEVER act without jurisdiction, and such a challenge is always timely (when it is supported by the facts of the case). Defendants' "Motion re Lack of

Jurisdiction" was based on their December 22, 2008 Notice of Appeal (wherein all transcripts have been prepared and paid for, but a briefing schedule has not yet been set). The focus of this appeal is Judge Rushing's insistence on ignoring the mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423, which affirms: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.'*" There was no indication that Judge Rushing would be willing to conduct the February 10, 2009 fees hearing, in accordance with *Gray v Justice's Court*, and she was in fact unwilling to do so. Accordingly, the hearing was an aspect of the case related to a pending appeal, and Judge Rushing had no authority to act at all in this matter. Thus *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 190 notes: "if the possible outcomes on appeal and the

actual or possible results of the proceeding are irreconcilable . . . *that proceeding must be stayed under section 916, subdivision (a).*"

Interspersed with Judge Rushing's repeated interruptions, as Defendants tried to read their jurisdictional motion, was a discussion of Defendants' "second line of defense" (an equitable argument that we deserved a postponement because so much of the briefing period for the $19,000 fees motion was improperly taken up by OEX proceedings). This was based on Judge Robert S. Boyd's January 20, 2009 ruling wiping out the effects of OEX proceedings, which Judge Boyd determined to have been conducted prematurely:

> So now that I am beginning to get a clearer picture of the whole story, not just this Court's role, which was the enforcement of the judgment, I believe that the Court was premature in the finding of contempt. At this time I am going to vacate the finding of contempt, as

that matter of enforcement on the $20,000 is on appeal.

Since Judge Rushing felt that Judge Boyd's Order of January 20, 2009 was a mistake, she brushed aside this equitable argument. When she rejected Defendants' jurisdictional challenge, Judge Rushing did so without explanation. Without skipping a beat, Judge Rushing went from her ruling that she did in fact have jurisdiction, to affirm her unexplained Tentative Ruling to grant Plaintiff's motion for attorney's fees in the amount of $19,000. There is no way that such a process of consideration can be considered a "meaningful hearing at a meaningful time" within the meaning of *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552. Accordingly, the $19,000 fees award should be vacated, and the process for setting Plaintiff's fees motion for proper

consideration should not be initiated prior to the ending of the "respite" period established by Judge Boyd's Order of January 20, 2009 (that is no renewed filing should take place before March 17, 2009).

Judge Rushing's invocation of California's "vexatious litigant" statute (CCP Sec 391) seeks to brand as frivolous, several of the 28 specific grievances whose supporting evidence and caselaw is set forth in the Appendix to this Petition. During proceedings where Judge Rushing issued the rulings that she claims are being frivolously challenged, she never cited any supporting authority, and rarely gave any explanation of her rulings. The main basis for Judge Rushing's February 9, 2009 Order to Show Cause, is set forth therein at 3:23-28:

> Specifically, the filing of numerous Appellate and Supreme Court actions constitutes repeated "attempts to relitigate, in propria

> persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." CCP Sec 391(b)(2).

This was written before Judge Rushing took the bench for her Fees Hearing at 8:30 AM on February 10, 2009, and it clearly reflects her view that a ruling by the Appellate Branch of a Superior Court is a final determination of a limited jurisdiction (less than $25,000 maximum award) case. In Judge Rushing's view any attempt to seek review by a court that is not obliged to take the case is, *ipso facto*, frivolous. This concept implies that the Plaintiff in *Elkins v Superior Court of Contra Costa County* (2007) 41 Cal 4th 1337 should have given up after the Court of Appeal summarily denied his challenge to procedures that were strongly (and

apparently unanimously) supported by the Contra Costa Superior Court. Such a broad definition of "frivolous" is untenable, and Judge Rushing's Order to Show Cause should be permanently stayed, without prejudice to its renewal, if and when the Sonoma County Superior Court rulings being challenged by Defendants have been shown to be consistent with governing precedents and consistent with proven facts in the case.

If a permanent stay without prejudice to renewal in appropriate circumstances is not considered a proper response to the intrusion upon Defendants' preparation and drafting time re their ongoing appeals, Defendants alternatively seek a delay in the slated April 14, 2009 hearing on Judge Rushing's Order to Show Cause. This period wherein the holding of such a hearing is barred should extend until the time for filing a petition for

review of the federal aspects of Defendants' allegedly frivolous claims has expired (thus providing an opportunity to seek a further stay in Federal Court). To provide a convenient "check list" for Defendants' Federal grievances, to facilitate a determination of which (if any) of them may be frivolous, they are listed with supporting authorities:

Summary of Defendants' Main Claims Set Forth in Accompanying Appendix
(For details relating to any of these claims, see same # in Appendix)

#1. Automatically giving the landlord the first available Unlawful Detainer trial date, sacrifices proper determination of the facts to speed of adjudication in violation of *Green v Superior Court* (1974) 10 Cal. 3d 616, 636; *Universal Oil Products Co. v Root Refining Co.* (1946) 328 U.S. 575, 580 and *Brinkerhoff-Faris Trust & Savings Co. v Hill* (1930) 281 U.S. 673, 682.

#2. Perjury can never be a valid means of depriving tenants facing eviction of 10 days of preparation and discovery time, which they are entitled to under circumstances of actual service. (*Kulko v California Superior Court* (1978) 436 U.S. 84, 101; *NAACP v Button* (1963) 371 U.S. 415, 428; *Hazel-Atlas Glass Co. v Hartford-Empire Co.* (1944) 322 U.S. 238, 245)

#3. A good faith attempt to challenge the proper invocation of a court's jurisdiction is not converted from a special appearance into a general appearance simply because the court refuses to take cognizance of the challenge. (*The 1880 Corporation v Superior Court* (1962) 57 Cal.2d 840, 843; *Pease v City of San Diego* (1949) 93 Cal 2d 706, 711-712; *Parsons v Superior Court of Marin County* (2007) 149 Cal.App.4th Supp. 1, 6)

#4. A pre-emptive strike against discovery by severing communications (in violation of CCP Sec 2016.040 and Local Rule 5.7D) cannot be the basis for denying discovery to a party who is in compliance with statutory and local rules. (*Townsend v Superior Court* (1998) 61 Cal.App.4th 1431, 1435; *Obregon v Superior Court* (1998) 67 Cal.App.4th 424, 434; *Schweiger v Superior Court* (1970) 3 Cal 3d 507, 514)

#5. Defendants' right to re-open discovery after Plaintiff's frivolous challenge to a jury trial forces postponement of original trial date (*Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 376; *Beverly Hospital v Superior Court* (1993) 19 Cal.App.4th 1289, 1293; *Fairmont Insurance Co. v Superior Court* (2000) 22 Cal 4th 245, 251)

#6. A meaningless distinction, such as putting the address of the disputed property at the top of a form, instead of as part of the answer to question #2, cannot be a valid basis for depriving a litigant of a federally protected right, such as his Seventh Amendment right to a trial by jury. (*United States v Mississippi* (1965) 380 U.S. 128, 132; *Adams v*

Murakami (1991) 54 Cal 3d 105, 120; *Broad River Power Co. v South Carolina* (1930) 281 U.S. 537, 540)

#7. The eviction of a tenant at the absolute discretion of the landlord is subject to challenge under state and federal laws proscribing arbitrary discrimination. (*Reitman v Mulkey* (1967) 387 U.S. 369, 371; *Romer v Evans* (1996) 517 U.S. 620, 633; *Marina Point v Wolfson* (1982) 30 Cal 3d 721, 730)

#8. Judge Rushing's total exclusion of anti-discrimination law from jury instruction and near total refusal to allow evidence of discrimination violated *Shelley v Kraemer* (1948) 334 U.S. 1, 20; *Mulkey v Reitman* (1966) 64 Cal 2d 529, 538 and *Koebke v Bernardo Heights Country Club* (2005) 36 Cal 4th 824, 839-840.

#9. Where there has been no proven contract violation, there is no obligation for the loser to pay the prevailing party's attorney's fees, even if he has signed a contract with an attorney fees clause. (*Alyeska Pipeline Service Co. v Wilderness Society* (1975) 421 U.S. 240, 247; *Hsu v Abbara* (1995) 9 Cal 4th 863, 875; *Santisas v Goodin* (1998) 17 Cal 4th 599,602, 608-609, 617, 619)

#10. Judge Rushing deliberately trashed the fundamental purpose of the strict limits on hearsay evidence "to preserve a party's Sixth Amendment right to confront and cross-examine an adverse witness and to disallow testimony coming from a witness who is not under oath and whose demeanor cannot be observed by the trier of fact." (*World-Wide*

Volkswagen Corp. v Woodson (1980) 444 U.S. 286, 292; *Abstract Investment Co. v Hutchison* (1962) 204 Cal.App.2d 242, 249; *United States v Fowlie* (1994) 24 F.3d 1059, 1069)

#11. Judge Rushing's misuse of Evidence Code Sec 352 and other rulings to shield prejudicial evidence from being discredited, produced a judgment in violation of due process, thereby transgressing *Pennoyer v Neff* (1878) 95 U.S. 714, 732-733; *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1354; and *Baugess v Paine* (1978) 22 Cal 3d 626, 638.

#12. Charles Jensen and Judge Rushing have employed tactics ranging from evasions to outright obstruction of justice, to pave the way for a punitive attorney fees award based on faulty premises. (*Cooter & Gell v Hartmax* (1990) 496 U.S. 384, 405; *United States v Silverman* (1984) 745 F.2d 1386, 1395; *City of Shasta Lake v County of Shasta* (1999) 75 Cal.App.4th 1, 11)

#13. Court files and briefing schedules have been manipulated to produce a deliberately orchestrated miscarriage of justice. (*Joint Anti-Fascist Refugee Committee v McGrath* (1951) 341 U.S. 123, 170; *Windsor v McVeigh* (1876) 93 U.S. 274, 277; *United States v Walasek* (1975) 527 F.2d 676, 680)

#14. By forcing Defendants to "change horses in the middle of the stream" in the process of granting Charles Jensen fees for opposing aspects of Defendants' case, whose conduct by Michael Halliwell was unopposed at the time, Judge Rushing has deliberately sought to make it impossible for two

self-represented litigants to effectively conduct their case. (*Faretta v California* (1967) 422 U.S. 806, 812-813; *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423; *Powers v Ohio* (1991) 499 U.S. 400, 410-411)

#15. Judge Chouteau has flouted Defendants' right to appeal (CCP Sec 902) from Judge Rushing's Judge Rushing's standing rulings. (*Nelson v Adams* (2000) 529 U.S. 460, 464; *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 198-199; *Conservatorship of Stewart* (1969) 276 Cal.App.2d 211, 215)

#16. Charles Jensen and Judge Rushing orchestrated the November 20, 2007 Exemption Claim Hearing and the run-up to it, to prevent James Parker from pointing out flaws in the excuse for circumventing the stay provisions for fees-only judgments. (*Jennings v Superior Court* (1967) 66 Cal 2d 867, 875-877; *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997; *Hall v Superior Court* (2005) 133 Cal.App.4th 908, 918-919)

#17. Judge Rushing's ruling that there had been no appeal of her $10,000 fees award was untenable when she made it, and it was a total fabrication when she acted off the record to circumvent the stay provisions of CCP 916(a) and turn over Defendants' $10,000 to Charles Jensen. (*Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655; *Nielson v Stumbos* (1990) 226 Cal.App.3d 301, 303; *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736)

#18. At the September 25, 2008 Appeal Hearing, Judge Chouteau was resolute in his determination to prevent Defendants from effectively presenting their

case. (*Baker v Carr* (1962) 369 U.S. 186, 204; *Warth v Seldin* (1975) 422 U.S. 490, 504; *20th Century Insurance Co. v Choong* (2000) 79 Cal.App.4th 1274, 1277)

#19. File tampering is a violation of Federal law against obstruction of justice (18 U.S.C. Sec 1503), which is serious enough to warrant adjudication whenever the opportunity finally presents itself. (*Mathews v Eldridge* (1976) 424 U.S. 319, 333; *United States v Neiswender* (1984) 590 F.2d 1269, 1272-1273; *Moore v Ogilvie* (1969) 394 U.S. 814, 816)

#20. Judges Rushing and Chouteau have used their various standing subterfuges to try to deprive Defendants of the most basic right under the United States Constitution: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (*Marbury v. Madison* (1803) 5 U.S. 137, 163; *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1283; *Estate of Buchman* (1954) 123 Cal.App.2d 546, 560)

#21. Fraud and favoritism can never be allowed to replace the rule of law as the "coin of the realm" in the judicial process, and a judge who has been previously censured (CJP Inquiry #177) for such behavior must be subjected to close judicial scrutiny on appeals involving unrebutted charges of deliberate judicial evasions. (*Yick Wo v Hopkins* (1886) 118 U.S. 356, 366-367, 373-374; *Hart v Massanari* (2001) 266 F.3d 1155, 1170; *Fuentes v Shevin* (1972) 407 U.S. 67, 80)

#22. The concealment of Judge Rushing's censure for dishonestly, admitted favoritism and seeking preferential treatment because her husband is a Court of Appeal Justice, and Charles Jensen's refusal to address the extent of his role in helping to save her job in these circumstances, is a proper occasion for retroactive exercise of a litigant's right of recusal against Judge Rushing and invalidation of everything she has done in this case. (*Bolling v Sharpe* (1954) 347 U.S. 497, 499; *Haworth v Superior Court* (2008) 164 Cal.App.4th 930, 942; *In re Gordon* (1996) 13 Cal 4th 472, 473)

#23. The integrity of judicial officers charged with fairly and even-handedly resolving disputes, is not simply a desirable characteristic which those making appointments to the bench hope to achieve, it is an enforceable right for litigants. *Kloepfer v Commission on Judicial Performance* (1989) 49 Cal 3d 826, 865; *Boddie v Connecticut* (1971) 401 U.S. 371, 375; *Armstrong v Manzo* (1965) 380 U.S. 545, 552)

#24. Whatever motions Plaintiffs may have, that rest on an implicit foundation that Sonoma County Superior Court rulings in his favor will emerge intact from the process of appellate review, should be continued until this review process is complete. (*Goldberg v Kelly* (1970) 397 U.S.254, 268-269; *Clark v Millsap* (1926) 197 Cal 765, 785; *Hernandez v Superior Court* (2004) 115 Cal.App.4th 1242, 1246)

#25. Defendants were forced to undergo **six** OEX hearings, subsequently found by Judge Robert S. Boyd to have been prematurely held, which impaired their ability to prosecute their appeals; such "second

front" tactics by Plaintiff should not be allowed. (*Webster v Sowders* (1988) 846 F.2d 1032, 1040; *United States v Buffalano* (1984) 727 F.2d 50, 54; *United States v Russell* (1921) 255 U.S. 138, 143)

#26. On January 14, 2008 Judge Chouteau established a briefing schedule on fees aspects of the case which could not be briefed earlier because key (September 25, 2007 and November 20, 2007) transcripts were not available, but he "pulled the plug" on this briefing on February 5, 2008. Briefing was not reinstated until May 13, 2008 (a week after Judge Rushing granted $20,720 in additional fees to Charles Jensen, based on the alleged legitimacy of her rulings of September 25, 2007 and November 20, 2007). Defendants should be protected by the "poisoned fruit of a poisoned tree" doctrine from this sort of judicial manipulation. (*Nebbia v New York* (1934) 291 U.S. 502, 525; *Byrne & Manov v Nezhat* (2001) 261 F.3d 1075, n 110; *Front Royal and Warren County Industrial Park Corporation by Town of Front Royal Virginia* (1998) 135 F.3d 275)

#27. A fair trial in a fair tribunal is a basic requirement of due process. A summary denial of a writ petition cannot be given "law of the case" effect, to brush aside documented evidence of deliberate judicial obstruction of justice. And higher courts have the power to investigate fraud whenever it is discovered. (*In re Murchison* (1955) 349 U.S. 133, 136; *Kowis v Howard* (1992) 3 Cal 4th 888, 897; *People v Malveaux* (1996) 50 Cal.App. 4th 1425, 1434)

#28. Except for a repeated "second and third front squeeze" created by the timing of Plaintiff's fees

motions, and manipulation (by Judge Chouteau) of the timing of consideration of appeals from the granting of these motions (by Judge Rushing), Appellants would have been able to deal with a manageable number of issues in an orderly framework. However, the recent introduction of two new fronts (a $19,000 fees award and institution of a "vexatious litigant" proceeding by Judge Rushing) leaves no viable option for protecting Defendants rights under CCP Sec 1086, except a direct Mandamus Appeal to the California Supreme Court. (*Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851; *Gromeeko v Superior Court* (1952) 114 Cal.App.2d 754, 757; *Louie Queriolo Trucking v Superior Court* (1967) 252 Cal.App.2d 194, 197)

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

First District
Court of Appeal
Division Two
Case # A123266

CALIFORNIA SUPREME COURT S170538

Sonoma County
Case # MCV 191306

Michael Halliwell, et al,
Petitioner vs.

Superior Court of
California, County of
Sonoma, Respondent;

Chrysanthe Paxinos,
Real Party in Interest

FILED FEB 17 2009
Clerk Supreme Court

Defendants/Appellants'
Reply to Second Front
Tactics by Real Party:
Appendix F for Petition re
Corrective Mandamus
Pursuant to CCP § 1086

This Appendix is a condensation of Defendants' Stay Motion of January 9, 2009, which extensively excerpts our Supersedeas Petition of January 3, 2009, which quotes at length the Federally related aspects of our California Supreme Court filings. Defendants January 3, 2009 and January 9, 2009 submissions were both ignored by Sonoma County Superior Court Presiding Judge Knoel Owen and Presiding Judge of the Appellate Branch Rene Auguste Chouteau. Defendants' most basic Federal grievance is the Denial of Equal Protection of the Laws, arising from the total disregard of governing precedents by the trial court

(Judge Elaine Rushing) and Appellate Branch (Presiding Judge Rene Auguste Chouteau). Because the trial court and the Appellate Branch have committed numerous violations of Due Process of Law in the course of consideration (or refusing to consider) important rights under State Law, this portion of the case also has an important Federal aspect. However the California Supreme Court's past and future rulings may be construed, this is not the last word on federal issues. *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 681 notes that "it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final."

Dated this 17th day of February, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

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SUMMARY OF FEDERAL ASPECTS OF DEFENDANTS' CLAIMS

All (page:line) references are to Defendants' Stay Motion of February 9, 2009

1. Sonoma County tenants deserve Equal Protection in the trial date setting process

Because tenants are not allowed the customary five days after the landlord makes his request to provide input on selection of a trial date, Plaintiff's counsel Charles Jensen successfully deprived Defendants of any opportunity for discovery and thereby violated the mandate of *Adams v Murakami* (1991) 54 Cal 3d 105, 120, "*The trial of a lawsuit is not a game where the spoils of victory go to the clever and technical regardless of the merits.*" In *Kulko v California Superior Court* (1978) 436 U.S. 84, 101, the U.S. Supreme Court invoked Due Process considerations to reverse the California Supreme Court's refusal to quash improper service. Depriving a defendant of an opportunity for fact-finding is a denial of Due Process, so this matter is subject to federal review. Because document fraud was a key element in this deprivation of Due Process, *Universal Oil Products Co. v Root Refining Co.* (1946) 328 U.S. 575, 580 authorizes an independent federal investigation of fraudulent tactics.

Recent Appeal briefing focuses on how the Sonoma County process operates:

> Charles Jensen asserts: "Counsel for Respondent filed his request for trial at the window and was given (he did not request a specific date) the first possible trial date. This is how the Sonoma County Superior Court conducts this process. If a "counter at-issue: is filed the Court can/has changed the date for trial if that is what is called for." (Reply Brief at 3) Charles Jensen knows why this process prejudices defendants in unlawful detainer actions. On June 25, 2007 he said to Judge Rushing: "Your Honor, discovery in an unlawful detainer is based on the date first set for trial. That is the language of the code section." (Transcript at 162:13-15, emphasis added.) (15:1-11)

Defendants immediately challenged the trial date setting process, and the role in it of Charles Jensen's fraudulent claims re the service of Plaintiff's trial-date setting request (14:11-25, 15:13-23). However, this drew a rebuke from Judge Gary Nadler, who warned Defendant for questioning the Court's trial setting process:

> We need to have an understanding with each other, Mr. Halliwell, you are now bordering in an area with your argument that I find to be disrespectful to this Court, and I'm going to

> warn you right now, sir, whether you are a lawyer or you are not, you are going to show this Court respect. By making accusations to the Court such as accusations of unfairness or something along those lines, sir, that is bordering on contempt of court. So I'm going to admonish you right now, you need to hear this very clearly, I will not sit here and I will not listen to those sorts of arguments. If you continue to make arguments like that, then I will find you in contempt of court. If I do that, sir, you are going to be facing the possibility of fines and/or jail time for each instance of contempt, okay? (Transcript at 16:15-17:1) (15:24 to 16:5)

Defendant indicated that he didn't mean to show any lack of respect for court employees, but stood by his assertion that the trial setting procedure was manifestly unfair, and cited unchallenged proof (provided by a window clerk in Room 107J) that showed the falsity of Charles Jensen's service claims. (16:6-17)

> Leaving aside the serious matter of how Mr. Jensen's BRIGHT BLUE form UD-150 could have been overlooked in the Case File on June 11, 2007 (when Defendant Mike Halliwell had a deputy clerk photocopy all fourteen pages in

the file not submitted by Defendants, and initial "C.O." to verify that there were only these fourteen pages not submitted by Defendants, and so attested in his affidavit of that date), the fact remains that **form UD-150 and every applicable precedent contemplates that the other side will have up to five days to submit a Counter-Request BEFORE any decision is made setting the case for trial.** Mr. Charles Jensen has somehow twisted the mandate of Local Rule 2.2A(1) which allows "a request to set the time of the trial" only "when a case is ready for trial," NOT AS A DEVICE TO PREVENT A CASE FROM EVER BEING READY FOR TRIAL BY PRECLUDING ALL DISCOVERY. Mr. Jensen somehow secured a decision on a trial date without the opportunity for input from the other side explicitly affirmed in Local Rule 2.2A(2). (16:18-25)

2. Defendants have a First Amendment (Court Access) right to enforce service rules

As the U.S. Supreme Court affirms in *NAACP v Button* (1963) 371 U.S. 415, 428 effective access to the courts for resolution of ones grievances, is a First Amendment Freedom, protected against state infringement by the Fourteenth Amendment. Perjury relating to service of process is a dagger to the heart of proper invocation of a court's jurisdiction, which is a right no state has legitimate power to destroy. Simply ignoring Defendants' well documented charges of perjury re the service of essential

documents, violates the mandate of *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 682: "*Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.*"

Defendants pointed out how Plaintiff's false service claims deprived them of 10 days of preparation time, and cited procedures set forth by the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp) in their attempt to secure action on their challenge to the adequacy of service before having to deal with other aspects of the case (17:10 to 18:14).

> Defendants did not seek any affirmative relief in their Answer, only restoration of ten days of preparation time and discovery they were cheated out of by false service claims. Defendants never had any channel to request affirmative relief, because Judge Nadler would not allow them to get onto his Law and Motion Calendar, and the Ex Parte channel offered no opportunity to rebut misrepresentations by

> the opposing party and no opportunity to explain the situation via oral argument. (18:15-21)

Defendants reminded Judge Nadler of the central focus of their June 4, 2007 answers (WITH RESPECT TO THE SUMMONS AND COMPLAINT THAT TRIGGERS THE DEADLINE FOR AN ANSWER TO AVOID A DEFAULT JUDGMENT, THE OCCUPANTS OF 1041 COPELAND CREEK DRIVE HAVE RECEIVED NOTHING IN PERSON OR SO FAR IN THE MAIL. CR-008), which qualified their involuntary participation in the case as a special appearance. They also explained how Charles Jensen's misrepresentations about service tried to obscure Defendants' proper status in the case, and Judge Nadler assured them that his mind was still open with respect to "any findings about service, whether it was proper or not." (18:24 to 19:19)

> Defendant Michael Halliwell responded: "I had a motion to show that they engaged in perjury in the process of getting this case started, and that operated to deprive me of any discovery by this manipulation of the time line." (Transcript at 443:3-6) When she commented on this issue, Judge Rushing said: "Such things as requests for finding Mr. Jensen, for example, guilty of perjury or some things that have to do with the service of process, I ruled that those, either they're irrelevant, inadmissible in this trial or, per timing, it's too late." (Transcript at 446:21-25) Judge Rushing added: "In the Court's view, the defendants were trying to go backwards. My job is to move the case forward." (Transcript at 447:1-2)
>
> Judge Rushing seemed to miss the point that **Defendants were only trying to get back to where Judge Nadler had left this issue. Judge Nadler told the parties: "I'm not making any findings right now, I haven't made any findings about service, whether it was proper or not, I don't want you to have that impression." (Transcript at 14:2-5)** (19:22 to 20:5)

Defendants also cited evidence of how the alleged timing of "personal service" (on June 2, 2007 at 7:45 PM) and the June 4, 2007 postmark on service by mail, showed the falsity of Charles

Jensen's service claims. Defendants also cited their June 11, 2007 letter to Plaintiff's counsel, pointing out the defects in service and their futile request for corrective action. (20:6-12)

3. Disregarding caselaw defining a "special appearance" is simply intolerable

The stubborn refusal of the Sonoma County Superior Court to consider evidence of perjured proofs of service, in the context of a tenant's right to a continuance to allow discovery in an unlawful detainer action, resembles the quality of justice available to Blacks in Mississippi courts half a century ago. (See *United States v Mississippi* (1965) 380 U.S. 128, 132, which struck down a literacy test which only 5% of voting age blacks were able to pass, wherein "an applicant for registration had to be able to read and copy in writing any section of the Mississippi Constitution, and give a reasonable interpretation of that section to the county registrar.") *Chambers v Nasco, Inc.* (1991) 501 U.S. 32, 44 cites *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944) 322 U.S. 238, 245; discussing the severity of damage from fraud, if a court were to simply turn a blind eye to it: "*This 'historic power of equity to set aside fraudulently begotten judgments,' is necessary to the integrity of the courts, for 'tampering with the administration of justice in [this] manner . . . involves far more than an*

injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.'"

Defendants cite *Schweiger v Superior Court* (1970) 3 Cal 3d 507, 514, in support of the priority of substantial justice over rigid application of the summary procedures for Unlawful Detainer actions, and their willingness to comply with the procedures to set forth in CCP Sec 1170.5(c) through 1750.5(f) to protect Plaintiff's interest in assuring the payment of accumulated rent. They pointed out that Plaintiff was hiding behind expedited consideration procedures to avoid clarifying a "THIS TERMINATION IS FOR CAUSE" assertion in his 60-Day Notice. (20:24 to 21:21)

> Michael Halliwell gave Defendants' perspective on the service issue: "We do not challenge the jurisdiction of this Court and service is adequate to establish a jurisdiction, but there are two alternatives under unlawful detainer law. Under one we have five days. Under the other we have 15. We allege and I

> need to pursue this matter in some detail but we allege they in fact said in open court that they had personally served us, and this is simply not true, and this document does not support his sworn testimony, but instead supports a different form of service. Therefore, we were robbed of ten days." (Transcript at 158:26 to 159:8) After complaining of Charles Jensen's manipulations to preclude discovery, Michael Halliwell continued: "And his only defense to our discovery request is that it is too late; therefore, this proof of service on the matter of original service is very much relevant inasmuch as the ten days would have allowed us to do discovery." (Transcript at 159:13-16) (21:24 to 22:6)

Defendants describe how Charles Jensen's completely and permanently severing all communications made it impossible for Defendants to lay a foundation for a motion re compulsory discovery pursuant to CCP Sec 2016.040. They also note how Jensen's own obstructionism was the reason why Defendants were unable to utilize the normal process in a special appearance of filing a motion to quash service. (22:7-18)

> Since the service issue was clouded by perjured Proofs of Service, Defendants were in no position to file an immediate Motion to Quash (which would have required a demonstration that an "officer of the court" was acting in a fashion that would make him vulnerable to being drummed out of the legal profession). The full extent of Charles Jensen's perjury did not become evident until documents missing from the Case File on June 11, 2007 (CR-025, CR-242, and CR-290 to CR-291) surfaced at trial. (CR-1362-1363) (22:19-22)

Defendants also note how Judge Rushing refused to consider the effects of lying by Charles Jensen, and ruled: "If this is a motion for continuance, the motion is officially denied, and so I'd like to move on to jury selection issues." (Transcript at 161:23-25) (22:23 to 23:7)

> In *The 1880 Corporation v Superior Court* (1962) 57 Cal 2d 840, 843 the court ruled that: "Interrogatories which are relevant to the subject matter of a motion to quash are consistent with the character of a proceeding had upon a special appearance." The opinion notes that a party's effort to enforce its jurisdictional rights under the Code of Civil Procedure did not constitute a general appearance, because a contrary result would

"emasculate" the statute. Our State Supreme Court therefore held that objections laying the foundation for a motion to quash, do not constitute a general appearance.

Pease v City of San Diego (1949) 93 Cal.App. 2d 706, 710-711 observes: "The ground stated was that the defendant city was not **properly** before the court and obviously the city did not intend thereby to appear generally." Defendants in *Paxinos v Halliwell & Parker* never sought "any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person," as *Pease* requires to constitute a general appearance. Moreover, *Pease* (93 Cal. App. 2d at 712) cites this exact parallel with the position here of Defendants Parker and Halliwell: "*The city did not demand that the action proceed to trial, or consent to the trial thereof.*" Defendants also invoked the holding of *Frohman v Bonelli* (1949) 91 Cal.App.2d 285, 291 that "an appearance made only on the hypothesis that the party is not properly before the court is a special appearance and that to hold otherwise would emasculate the statute." (23:9 to 24:2)

Defendants also cite their long-standing right under *Lacrabere v Wise* (1904) 141 Cal 554, 556, to full adjudication of the service issue, according to established rules of evidence. (24:3-8)

Parsons v Superior Court of Marin County (2007) 149 Cal.App.4th Supp. 1, 6 notes this basic principle: "Strict compliance with the specifically prescribed notice conditions is a prerequisite to invoking the summary procedures of unlawful detainer." *Parsons* also notes that rules for a party's challenging the sufficiency of service should not be applied so as to construe this as a general appearance, because this "moots the very point he is seeking to raise." (*Delta Imports, Inc. v Municipal Court* (1983) 146 Cal. App. 3d 1033, 1036.) (24:9-14)

4. Charles Jensen sabotaged discovery from the outset by refusing to confer

Discovery is certainly an essential ingredient in making the process of unlawful detainer adjudication work effectively for a tenant who is being wrongfully evicted. The special needs of litigation involving one's domicile are discussed by Justice Douglas in *Lindsey v Normet* (1972) 405 U.S. 56, 90: "the home, even though it be in the slums, is where a man's roots are. To put him in the street [without timely consideration of an essential element of his defense] deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case." If governing state precedents had been followed in this case, it could never have degenerated into the

1 ½ year long ordeal it has become. ***International Shoe Co. v Washington*** **(1945) 326 U.S. 316, 319 discusses the scope of Fourteenth Amendment limitations on State legal procedures: "Whether due process is satisfied must depend, rather, upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.*"**

Defendants' page-by-page requests to clarify the June 11, 2007 Case File notes:

The date "30 Mar 07" on the previous page may be significant, because the attachment sets a Meadow Pines Homeowners Association hearing date and time of "Monday, March 26, 2007 at 6:30 pm." There is a presumption in law that evidence in the possession of a party would be divulged if that evidence was helpful to his or her case. The results (if indeed the hearing took place as scheduled) are unknown to Defendants, in spite of their efforts to secure this information from the Meadow Pines Homeowners Association. This page is a February 20, 2007 NOTICE OF HEARING, not any sort of finding. The VIOLATION REPORTED is "Ongoing threatening behavior of your tenant toward other residents." Defendants have tried without success to learn the name of the person who made this report or the nature of the conduct alleged by this anonymous person. Whoever the complainant turns out to be, the nature of the complaint is the pivotal factor in Plaintiff's case. The pos-

> ture of total stone-walling by Plaintiff in this case, again supports the legal presumption that evidence on this point is not favorable to Plaintiff. (CR-029).
>
> Charles Jensen concealed a report on a March 26, 2007 Homeowners' Association meeting which James Parker was not allowed to attend, and violated discovery guidelines by severing communications to prevent Defendants from initiating procedures necessary to secure this information. [When Defendants used ex parte applications to try to secure an opportunity for discovery, Plaintiff's counsel violated Local Rule 5.7D by refusing to "meet and confer" to clarify this situation.] Jensen also sidetracked Defendants' efforts to use Form Interrogatories 71.7 and 77.1 to find out about alleged "ongoing threatening behavior of your tenant toward other residents" and falsified and circumvented the process mandated by Form UD-150 for trial date setting. (25:2-16)

Defendant explained to Judge Nadler why the presumption that a lawyer is telling the truth prevented the tenants facing eviction from filing motions to enforce procedural rights without first establishing a factual foundation on the service issue. Because of the Sonoma County policy of

giving the landlord the first available trial date, discovery was impossible, so Plaintiff had a "heads I win, tails you lose" situation. (25:17 to 26:14)

> James Parker also complained, "I had been trying for six months to try to find out what the issue is without any success." (Transcript at 11:20-22) Since Plaintiff's documents relating to his request for a court trial were missing from the case file, Defendants protested the tactics of Plaintiff's attorneys in their June 11, 2007 Request for Jury Trial: **In the most literal sense of this expression, they are "trying to pull a fast one."** It is difficult to imagine how this case can be fairly adjudicated, unless Plaintiff is forced to divulge the facts on which he relied in making his decision to evict. The sort of "Star Chamber" proceedings apparently utilized by the Meadow Pines Homeowners Association, wherein the complaint was anonymous, its contents confidential and Mr. Parker had no right to confront his accuser, nor to offer any sort of defense, nor to learn what in fact transpired in these proceedings, if any action was indeed taken (pursuant to the notice appended to Plaintiff's complaint alleging "threatening behavior"); cannot be allowed to stand as a basis for eviction. (CR-021) (CR-1138-1139) (26:15-21)
>
> On July 26, 2007 Charles Jensen asserted that "counsel was under no obligation to

> educate the defendants in counsel's tactics at trial." In fact, *Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 376 and *Chronicle Pub. Co. v Superior Court* (1960) 54 Cal 2d 548, 561 proclaim that legislatively mandated legal procedures are intended to do away "with the sporting theory of litigation – namely, surprise at the trial." Moreover, it was Charles Jensen's false claims with respect to service which allowed him manipulate the time line to avoid providing the answers required in Form Interrogatories 71.7 & 77.1 (which were invoked in substance in Defendant's filing of June 17, 2007 and formally presented on June 21, 2007). (26:22 to 23:5)

Charles Jensen flouted Business & Professions Code Section 6068(d) and California Attorney Guidelines of Civility and Professionalism (calbar.ca.gov.) #9:

> Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Townsend v Superior Court (1998) 61 Cal.App. 4th 1431, 1435 notes: "The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to

obtain 'an informal resolution of each issue.'" *Obregon v Superior Court* (1998) 67 Cal.App. 4th 424, 434 observes:

As *Townsend* notes, it is a 'central precept' of the Civil Discovery Act of 1986 that discovery "be essentially self-executing." (61 Cal.App.4th at 1434.) Thus reasonable and good faith efforts at informal resolution of discovery disputes are no doubt a key part of the discovery system. It is also a central precept of the discovery system, however, that "[i]n order to accomplish the various legislative purposes [of the discovery law], the several statutes must be construed liberally in favor or disclosure. . ." *Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 377; *Emerson Electric v Superior Court* (1997) 16 Cal 4th 1101, 1108.

Greyhound Corp. v Superior Court (1961) 56 Cal 2d 355, 376 observes: "Certainly, it can be said, that the Legislature intended to take the 'game' element out of trial preparation while yet retaining the adversary nature of the trial itself. One of the principal purposes of discovery was to do away 'with the sporting theory of litigation – namely, surprise at the trial.' (*Chronicle Pub. Co. v Superior Court* (1960) 54 Cal 2d 548, 561.)" (27:3-19)

5. Charles Jensen blamed Defendants for HIS refusal to facilitate discovery

If the State Legislature had not intended for

discovery to be a viable possibility in Unlawful Detainer actions it would not have enacted CCP Sec 2033.710 to authorize the Judicial Council to develop Form Interrogatories, that are clearly intended to assure a solid foundation of facts for most landlord-tenant controversies which could be anticipated. Charles Jensen's Filing a February 20, 2007 Notice of Hearing as an attachment to his March 28, 2007 60-Day Termination Notice, when the Report for the March 26, 2007 hearing was in hand was a clear defiance of the Best Evidence rule and an obvious tactic to surprise Defendants with the hearing Report when it was too late for them to properly evaluate its credibility. This tactic to deny the underlying facts to Defendants and to the court was every bit as premeditated as the patent subterfuge in *Hazel-Atlas Glass Co. v Hartford-Empire Co.* (1944) 322 U.S. 238, 251, where Justice Roberts observes: "*No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued.*"

Defendants' most important Federal grievance is the infringement of the Bill of Rights by preventing James Parker from finding out the nature of the charges against him (in violation of the Sixth

Amendment), and punishing his petitioning for the redress of grievances (in violation of the First Amendment). (28:5-15)

> There is no such thing as a legitimate "sneak attack" in the law, and the spirit embodied in CCP Sec. 2033.220(a) should be reflected in discovery and every other aspect of presenting the facts of a case: "Each answer in response to requests for admission shall be as complete and straightforward as the information available to the responding party permits." The California Judicial Council (under the mandate of CCP Sec. 2033.710 in developing UD-106) has sought to make sure that a landlord's "hidden intentions" do not remain so, with Form Interrogatory 77.1 which says: "State all reason that the **NOTICE TO QUIT** was served or that defendant's tenancy was not renewed and for each reason [details omitted]. Form Interrogatory 71.7 says: "Has any **PERSON** ever reported any nuisance or disturbance at or destruction of the **RENTAL UNIT** or **PROPERTY** caused by the defendant or other occupant of the **RENTAL UNIT** or their guests? If so, for each report state [details omitted].
>
> Charles Jensen asserts with respect to Defendants: "They do not however state why they delayed in serving their requests. They only make hearsay accusations that counsel evaded them. All they had to do was serve the

request." (Reply Brief at 5) This does not square with this aspect of Defendants' search for the results of the March 28, 2007 Hearing described in Defendants' Consolidated Brief "It involved giving Defendants' 'Request to Bar Surprise Evidence (CR-106) which mostly consisted of Form Interrogatories 71.7 and 77.1 (CI: 0180), directly to Kadin Blonski while the parties waited for Judge Nadler's decision on restoration of their right to a jury trial; when Mr. Blonski passed this proposed evidence sanction to Charles Jensen, he tersely remarked, 'This isn't the law.'" (4:23-25). This is indeed hearsay, but Charles Jensen does not contest the reliability of it, and it is certainly more reliable than the anonymously compiled second- and third-hand complaints in Plaintiff's Exhibit #5 (CR-144)

In *Fairmont Insurance Co. v Superior Court* (2000) 22 Cal 4th 245, 251, the California Supreme Court speaks approvingly of the resetting of the discovery time clock endorsed in *Beverly Hospital v Superior Court* (1993) 19 Cal.App.4th 1289, 1293: "It is also consistent with the legislative history of the provision and the Civil Discovery Act of 1986 of which it is part, which indicate that the purpose of the statute was to eliminate a source of discovery abuse and unnecessary trial delays caused by parties seeking continuances or postponements of trial for the sole purpose of extending the time for discovery." There is nothing more certain in the case at bar than that Charles Jensen's no-notice June 19, 2007 challenge to

> Defendants' right to a jury trial was NOT motivated "for the sole purpose of extending the time for discovery." [Appeal Briefing at CR-1491 to 1492]. (28:16 to 29:11)

Charles Jensen launched a tirade about "somebody who is uneducated, doesn't know what he is doing, and doesn't choose to follow the law" to divert Judge Rushing from his obstructing discovery to achieve surprise at trial, in violation of *Greyhound Corp v Superior Court* (1961) 56 Cal 2d 355, 376. (29:13 to 30:5)

Because of setting the trial date on the basis of fabrications embodied in Charles Jensen's Form UD-150, the only way Defendants' could have secured information about the results of a March 26, 2008 Homeowner's Association hearing (referenced in Plaintiff's 60-Day Notice to Quit and withheld from James Parker for two months) is if the landlord supplied these hearing results voluntarily. (30:6-19)

After the original June 19, 2007 trial date was disrupted by Charles Jensen's frivolous challenge to Defendants' right to a jury, *Fairmont Insurance Co. v Superior Court* (2000) 22 Cal 4th 245,246-247 and *Beverly Hospital v Superior Court* (1993) Cal.App.4th 1289, 1293, supported requiring Plaintiff to answer to Form Interrogatories 71.7 & 77.1. (30:20 to 31:3)

6. Putting right address in wrong place on Form UD-150 was basis of jury denial try

**How any judge with his priorities straight could, even temporarily, give a "misplaced" address (which everyone knew already), priority over tenants' Seventh Amendment right to a jury trial, is a mystery. After having rectified this error, Judge Nadler showed an extreme lack of fundamental fairness in denying Defendants a meaningful opportunity for input on jury instructions (on the absurd ground that they should have used the time they had to devote to preparing a reconsideration motion to restore their right to a jury, into preparation of jury instructions, for what was scheduled at the time to be a court trial). This clearly brings into play the mandate of *Broad River Power Co. v South Carolina* (1930) 281 U.S. 537, 540: "*Whether the state court has denied to rights asserted under local law the*

protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

Charles Jensen challenged Defendants' June 14, 2007 Jury Trial Request:

[This challenge pointed out that Defendants' jury request form failed to answer two questions (because Charles Jensen had never sent them a copy of his request for a court trial, as he was required to do), the estimated duration of the trial and whether Jensen's request had asked for a court reporter. Charles Jensen then gave his main objections:]

It goes on to say, too, Your Honor, under the rules that are required for the preparation of the "at issue" itself that your U.D. Form 150, which is what you hold in your hand, at paragraph number two, must identify the address in question. It goes on in that same form in paragraph number five as to "any dates you are not available, the reasons for the unavailability."

My argument is very simple, Your Honor. Were I to bring such an "at issue" deficient in

> any one of those four, it would not be accepted at the clerk's office for filing. I am not here to point fingers at Connie, the Court's judicial assistant. She is not empowered or trained in the acceptance of forms. She accepted it as I feel she should have, in the form in which it was presented. Nevertheless, Your Honor, if I were to bring an at issue memorandum deficient in any one of those, it would not be accepted. And at this time because the at issue memorandum setting forth the request for a jury trial is void and deficient on its face in four separate instances, that the "at issue" be stricken. (Transcript at 6:7-26) (31:20 to 32:7)

After Defendant Michael Halliwell explained why he could not supply some of the information left off of his Form UD-150 Counter-Request (because the original request for a trial date was missing from the court file), he pointed out that he had followed the guidance of Judge Nadler's judicial assistant (with respect to the placement of the tenants' address and Defendants being available to start the trial whenever the necessary preliminaries were completed). (32:13 to 33:18)

Judge Nadler gave his decision on Charles Jensen's motion for a court trial:

Okay, in trial we are. Let me start off with ruling on some motions that were made this morning. The motion to strike the counter-demand is granted, and that will be the counter-demand for a jury trial, based on the deficiencies of the demand. (Transcript at 31:6-11) (CR-1148)

At the scheduled 9:00 AM time for the start of proceedings Michael Halliwell presented a copy of Defendant's motion for reconsideration of striking their demand for a jury trial to opposing counsel and to Judge Nadler's judicial assistant. Judge Nadler entered the courtroom at 9:37 AM, and addressed the parties:

I have the motion for reconsideration of the Court's order vacating or striking the demand made by the Defendants in this case, and the reason for the delay has been that the Court has been reading the pleadings, re-evaluating the Court's decision in this case, and the Court has reached the following conclusion, which will come as some surprise.

In reality the argument is that the counter-request left information out, and that it should be construed strictly as it would for the original filing, and if so construed the clerk would not file it, therefore, the Court should strike the counter-request. The argument made by Defendants was that the information

> that was left off of the counter request essentially was information that was contained in the original request. The law is clear that in Unlawful Detainer cases a party is entitled to a jury in most circumstances, almost all circumstances, and the question then becomes whether or not these defendants are or are not entitled to a trial by jury.
>
> It is convenient for the Court to consider the realities of a jury trial in light of these circumstances and to make a decision that includes consideration of those realities. In retrospect, and considering these issues, the Court is inclined to grant the motion for reconsideration in this case and allow this case to go to a jury, reluctantly, but perhaps that is the right thing to do. (33:19 to 34:10)

Defendants discuss the unfairness of Plaintiff's filing a summary judgment motion, without the five days notice required by CCP Sec 1170.7. They also point out that Plaintiff's time-consuming summary judgment motion, made it especially important that Defendants not be required to provide their suggestions for jury instructions until

the time established by Local Rule 4.10H(1) "before the first witness is sworn." (34:21 to 35:15)

> Judge Nadler ignored the complex pretrial matters he had deferred from 6/18 to 6/19 (CR-082) as was made necessary by Charles Jensen's refusal to meet and confer as required by Local Rule 5.7D (when he opposed Defendants ex parte applications for procedural relief), which Defendants expected to iron out before any jury trial started on June 19th (before Charles Jensen sidetracked everything with two no-notice motions he read from his own notes, without giving a copy to Defendants). Thus he proclaimed:
>
> Noon tomorrow is the Order, and the reason for that, sir, is the rules require you to have these papers [the other item was a joint statement of the case, pursuant to Local Rule 4.10D, which could not be prepared until Charles Jensen relented from his refusal to confer with Defendants] prepared and ready to go and should have had them prepared and ready to go this week and did not do so. (Transcript at 92:5-8) (35:16-22)

It turned out that the reason why a Friday 12:00 noon deadline for proposed jury instructions was imposed, was to allow Judge Rushing's Division 19 to shut down four hours before the normal 4:00

PM closing time. Judge Nadler cut short Defendants' effort to cope with the various breaches of statewide and local rules, by refusing to listen to our final plea, saying: "I don't want to hear it, Mr. Halliwell, I'm not the judge now." (35:23 to 36:14)

> It seems fundamentally unjust to Defendants that Local Rules [4.10H(1)] can be swept aside by "Court ordered deadlines" (which Judge Nadler did by requiring proposed jury instructions be submitted **72 hours before they are required by Local Rules**), without providing an opportunity for self-represented litigants to adjust to changes in the rules they have gone to the trouble of learning, and are doing their level best to comply with. (CR-795:17-25) (36:14-17)

7. Scope of State and Federal protection against arbitrary discrimination

***Reitman v Mulkey* (1967) 387 U.S. 369, 371 invalidated Proposition 14, which said: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." *Reitman v Mulkey* (1967)**

387 U.S. 369, 377 rejected Prop 14 on federal grounds because: "The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. *Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.*" *Reitman v Mulkey* (1967) 387 U.S. 369, 381 discussed the prohibited intent of Prop 14: "The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned." *Romer v Evans* (1996) 517 U.S. 620, 633 affirms that equality requires impartiality: "*Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.*"

James Parker recalls his letters and conversation with landlord Gus Paxinos seeking his permission to attend Homeowners' Association meetings where his own complaints and disputes with

neighbors were to be discussed. Parker testified that Paxinos never gave his permission, and observed that when Michael Halliwell wrote to the landlord supporting his co-tenant's right to confront his accusers, the landlord retaliated by issuing a three-day eviction notice to Halliwell. (37:13 to 38:15)

> Defendants' June 11th filing also fleshed out their anti-discrimination defense:
>
> The Supreme Court ruled in *Marina Point v Wolfson* (1982) 30 Cal 3d 721, 730:
>
> Contrary to the municipal court's conclusion, the anti-discrimination provisions of the Unruh Act are not confined only to a limited category of "protected classes" but rather protect "all persons" from any arbitrary discrimination by a business establishment. (*In re Cox*, 3 Cal 3d at p. 212.) In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept or reject tenants on the basis of the landlord's own likes and dislikes. (CR-016) (38:16-21)

Defendants cite AB 1400 (in effect more than a year before eviction proceedings were initiated against James Parker) which affirms that the categories listed in the Unruh Act are illustrative rather than restrictive, and that California law prohibits any arbitrary discrimination. Defendants point out that making the disputed property into a "Bill of Rights Free Zone," where a tenant's exercise of his constitutional rights (to confront his accusers and find out the nature of charges against him) becomes a valid basis for eviction, certainly qualifies as arbitrary discrimination. (38:22 to 39:15)

> Defendants cite Michael Halliwell's June 19, 2007 testimony about AB 1400:
>
> My first point on this, again, this is an analysis of AB 1400 adopted effective January 1st, 2006, in essence a recent amendment to the Unruh Act, and it says the act protects as amended, which basically is embracing the reasoning of *Marina v Wolfson*, which I will also quote, but this says the act protects all persons from arbitrary discrimination by

> business establishments, not just on the grounds enumerated in the statute. In other words, if we were able to establish that the category being discriminated against was uppity tenants, in other words, we want tenants in our building, only the docile type who don't want the rules enforced, by golly in this apartment building my word is law, and if you don't recognize that, I'm going to use my power as a landlord to kick you out. Now if the factual predicate were established for that, would, in fact, that assertion or that degree of power by a landlord constitute arbitrary discrimination within the meaning of the Unruh Act, because I think there is – it is clear that it is general arbitrary discrimination that is precluded, not discrimination against particular categories. (Transcript at 77:7-27) (CR-1163) (39:16-24)

Defendants pointed out in pre-trial proceedings that any "right to discriminate" which might be thought to exist in California law was squarely rejected on federal grounds when an initiative constitutional amendment (Proposition 14) sought to place such a right in the California State Constitution. In *Mulkey v Reitman* (1966) 64 Cal 2d 528, 538, the California Supreme Court ruled that this

federal anti-discrimination protection existed, because under the Fourteenth Amendment equality in the enjoyment of property rights, was regarded as an essential pre-condition to the realization of the other basic civil rights and liberties which that amendment was intended to guarantee. (39:25 to 40:23)

> Judge Nadler asked Plaintiff to respond to Defendant. Charles Jensen answered:
>
> I have listened to this charade all day long. It is the only anger I'll express. If people wish to quote the law, they should quote it correctly, whether they are an attorney or a law student, or a defendant. *Marina v Wolfson* and its companion case, not surprisingly *Wolfson v Marina* has to do with discrimination of children, period. The only dicta that was given to this court is just that, dicta, it is not the holding of *Wolfson*. *Wolfson* very clearly said you can no longer rent to so many adults and so many children if they breathe air. They are persons, and that's why [in] 1982 CAA, California Apartment Association and the PBC people changed all the rental agreements and it now says people. To quote *Wolfson* for other than that is to intentionally and knowingly mislead the Court. The Court is dead on the money with the application of Unruh, and its nonapplication in this case.

(Transcript at 81:25-82:13) (CR-1166) (40:24 to 41:7)

Also, Judge Rushing ruled out vital evidence of retaliation by the landlord within six months of the filing of Plaintiff's lawsuit to enforce eviction, in direct violation of the explicit terms of Civil Code Sec 1942.5(a). (41:8-25)

8. Judge Rushing completely vitiates the mandates of anti-discrimination caselaw

Even though Judge Nadler had misapplied Local Rule 4.10H(1), when he insisted that Defendants file their proposed jury instructions 72 hours before they were actually due under Local Rule 4.10H(1), Judge Rushing went along with Charles Jensen's attack on the format of Defendants' submission: "They are in some form of a legal treatise, but they're not – they're not BAJI. They're not CALJIC." (Transcript at 166:23-25) Judge Rushing ruled that the lack of a timely submission by Defendants in the proper format constituted "a waiver of their right to submit anything in the form of a written statement to be read or the jury instructions. That time has come and gone." (Transcript at 169:21-23) Judge Rushing may have felt she had authority, as a matter of state law, to make her court into an indirect enforcer of the discrimination against tenants in

the complaint evaluation policy of the Meadow Pines Homeowner's Association. However, state law CANNOT justify enforcement of such a restrictive covenant in the face of FEDERAL protection against arbitrary discrimination. In the course of invalidating such a course of action six decades ago, the U.S. Supreme Court ruled in *Shelley v Kraemer* (1948) 334 U.S. 1, 20: "*The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.*"

Judge Rushing explained her rejection of Defendants' proposed jury instructions based on protection against arbitrary discrimination: "The document you submitted is not – I mean, there are things in it that could be used as jury instructions, but that's – you're making me do a lot of work for you and that's not my job." Because Judge Rushing ruled that Homeowner's Association policies which made tenants into second-class citizens with respect to redress of grievances were irrelevant, her ruling

was a direct challenge to the protection of key rights in the Bill of Rights, affirmed in CCP Sec 425.16(a). (42:13 to 43:12)

> After a series of attempted questions and objections relating to whether Gus Paxinos would have wanted to do a credit check on any replacement for Mr. Howard and why no attempt had been made to inquire about the creditworthiness of Mr. Halliwell, the witness was asked this question about the basis for his attempting to evict him by Michael Halliwell: "In exercising your right to elect to allow me to stay or not to stay, did you make any inquiries whatsoever from any source whatsoever about any characteristic whatsoever of Michael Halliwell?" (Transcript at 224:6-9) Charles Jensen intervened: "*Objection, Your Honor. Relevance.*" (Transcript at 224:10) Judge Rushing ruled: "**Sustained.**" (Transcript at 224:11) Michael Halliwell responded: "I'm asking him about his decision making process; this is a discrimination case, and I don't understand how it could possibly be irrelevant, [asking] how he is exercising his discretion." (Transcript at 224:12-15) Judge Rushing replied: "**I'm sustaining the objection.**" (Transcript at 224:16) (43:13-20)

Judge Rushing's telling the jury with respect to the 3-Day Notice demanding the eviction of

Defendant Michael Halliwell, "you cannot consider the parties hidden intentions" and her refusal to allow a jury finding the validity of this reason for issuance of the 3-Day Notice, took the whole issue of arbitrary discrimination off the jury's radar screen (since hardly anyone admits his reasons are discriminatory). (43:21 to 44:9)

> Charles Jensen admits with respect to *Marina v Wolfson* (which is unequivocally a decision applying the Unruh Civil Rights Act) that this decision "does protect persons from arbitrary discrimination." Charles Jensen says: *"Judge Rushing disallowed the Unruh act argument, and yet he [Michael Halliwell] goes on and on about rulings or statements made by Judge Nadler who did not try this matter. The Unruh Act was designed to protect parties from being discriminated against on the basis of protected class."* (R8:11-15). See initial part of Appellants' Appendix re Respondent's Jury-Instruction Citations and Related Cases re *Marina v Wolfson* for cases rejecting this idea. *In re Cox* (1970) 3 Cal 3d 205, 216 ruled that the categories in the Unruh Act were "illustrative rather than restrictive" and (about when the Legislature, in adopting AB 1400, codified what had previously been only dicta in *Marina v Wolfson*) the California Supreme

Court noted in *Koebke v Bernardo Heights Country Club* (2005) 36 Cal 4th 824, 839-840: "We also concluded that in enacting the Unruh Act, the Legislature intended to ban all forms of arbitrary discrimination in public accommodations." (44:10-17)

Charles Jensen tries to pretend that the jury was allowed to determine whether there had been arbitrary discrimination in the landlord's decision to evict, saying in his Reply Brief: *"It is true that Marina v Wolfson (1982) 30 Cal 3d 721, 730 does protect persons from arbitrary discrimination. Appellants just refuse to accept there was nothing arbitrary in evicting them."* (R8:18-20) This assertion ignores Judge Rushing's actual rulings noted in Appellants' Opening Brief (1A26:4-21):

> Judge Rushing completely refused to include anything about anti-discrimination law in her jury instructions, in spite of Defendants' bolstering *Shelley v Kraemer* (1948) and *Mulkey v Reitman* (1966) with the clearly controlling *Marina Point v Wolfson* (1982) precedent and its legislative enactment by AB 1400 (effective January 1, 2006) in their proposed jury instructions (CR-094). (44:18-25)

Michael Halliwell cited key governing precedents in his June 19, 2007 testimony:

In *Shelley v Kraemer* [(1948) 334 U.S. 1, 14], the [California Supreme] Court continues, that's a U.S. Supreme Court precedent, here we have California's [highest] Court applying a precedent giving the interpretation of the Federal Constitution by the U.S. Supreme Court. *Mulkey v Reitman* [(1966) 64 Cal 2d 529, 538] continues: "*In the broad sense state action has been consistently found where the state in any meaningful way has lent its process to the achievement of discrimination, even when that goal was not within the state's purpose. In that case Shelley v Kraemer, supra, the Court stated at page 14, 'The amendment makes void state action of every kind which is inconsistent with the guarantees therein contained in the 14th Amendment and extends to manifestations of state authority in the shape of laws, customs, judicial or executive proceedings.*'" Remember, Proposition 14 was struck down on this. (June 19, 2007 Transcript at 80:11-26) (45:1-8)

9. Awarding attorney's fees with NO specific basis is a clear Due Process violation

In the absence of a contract violation which is explicitly covered by an attorney's fees clause, the "American system" requires each side in a legal dispute to pay its own attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society* (1975) 421 U.S. 240, 247 observes: "*In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.*" Since Plaintiff

abandoned his effort to show cause (and won by invoking a landlord's right to evict at will), Federal Law makes ANY attorney fees award to Plaintiff excessive. *St. Louis, Iron Mountain & Southern Railway Co. v Wynn* (1912) 224 U.S. 354, 361 held: "*When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorneys' fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it.* [We purposely refrain from considering Appellants' other grounds.] Confining ourselves to what is necessary for the decision of the case in hand, *we hold that the statute, as construed and applied by the state courts, is wanting in due process of law and repugnant to the Fourteenth Amendment of the Constitution of the United States.*"

Plaintiff started out with a contract claim, and tried to secure a verdict by Judge Nadler on that basis with a June 19, 2007 no-notice motion for summary judgment (in violation of CCP Sec 1170.7). But Judge Nadler never ruled on this motion and Charles Jensen never renewed it before Judge Rushing, as Judge Nadler suggested he might (probably because Charles Jensen no longer had the element of surprise). *Xuerab v Marcus & Millichap, Inc.* (1992) 3 Cal. App.4th 1338, 1341-1342 ruled out this sort of "bait and switch" method of securing fees because "although the buyers initially sued for breach of contract, they did not go to trial on that

basis." Moreover, *Exxess Electronixx v Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708, citing numerous passages in *Santisas v Goodin* (1998) 17 Cal 4th 599, affirms that "the question of whether to award attorney's fees turns on the language of the contractual provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision.").

Hsu v Abbara (1995) 9 Cal 4th 863, 873-874 discusses clear legislative intent:

In 1987, the Legislature amended [Civil Code] section 1717 to its current form. (Stats. 1987, ch. 1080, Sec 1, p. 3648.) The Legislature replaced the term "prevailing party" with the term "party prevailing on the contract," evidently to emphasize that the determination of prevailing party for purposes of contractual attorney fees was to be made without reference to the success or failure of noncontract claims. (See, e.g., On v Cow Hollow Properties (1990) 222 Cal.App. 3d 1568, 1574.)

Hsu v Abbara (1995) 9 Cal 4th 863, 875 gives an example of applying Sec 1717:

One case, for example, involved cross-actions by neighboring landowners for breach of covenants, conditions, and restrictions (CC&R's containing an attorney fees provision. (Banks v Lucas (1992) 9 Cal.App.4th 365, 369): [In *Banks v Lucas supra*] because ultimately no

> relief was awarded to any party under the CC&R's, the Court of Appeal found, as a matter of law, that there was no party prevailing on the contract under section 1717. (45:24 to 46:15)

Judge Rushing entirely disregarded the fact that Plaintiff abandoned ANY effort to prove a contract violation (or any cause at all for eviction). She disregarded everything in James Parker's August 22, 2007 Opposition brief (which she pretended did not exist as a basis for a $10,000 default judgment in Plaintiff's favor). (46:16 to 47:25)

> Parker cites *Walters v Marler* (1978) 83 Cal. App.3d 1, 27-28 quoting *McKenzie v Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89-90 rejecting the idea that the Legislature in enacting Civil Code sec 1717 meant to include "all provisions in the contract allowing for attorney's fees, whether or not those fees are incurred to enforce the provisions of the contract." It states that the only reasonable interpretation of section 1717 is "the allowance of attorney's fees only when such fees are incurred to enforce the provisions of the contract." Parker's August 22nd Memorandum points out: "The jury has found NO breach of contract and the contractual language (clause #13 in the rental

contract allows attorney's fees only 'to enforce any part of this agreement.')" (46:19-23)

The ONLY case cited in Plaintiff's brief seeking $20,680 for reading Defendants' various filings, which relates to the work for which compensation is sought, squarely supports Defendants' position that contract claims are the only ones which may generate attorney's fees, and then only for the legal work performed in the defense of such claims: "When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in the prosecution or defense of those claims." *Scott Co. v. Blount* (1999) 20 Cal 4th 1103, 1109. (See Plaintiff's March 25, 2008 Brief at 7:15-19.) (47:8-13)

James Parker's reasoning on the need for a party to show a contract violation to invoke a contractual provision for attorney's fees was directly supported by *Santisas v Goodin* (1998) 17 Cal.4th 599 at 602, 608-609, 617, 619. This governing precedent holds that "the question of whether to award attorney's fees turns on the language of the contractual attorneys' fees provision" and "whether the type of claim is within the scope of the provision." (48:1-4)

Appellants' April 18, 2008 Petition **(at 8:19 to 9:6)** discusses how Charles Jensen refused to accept the $375 specified by Local Rule 2.2E for the prevailing party in a normal court trial **(he demanded an UNREVIEWABLE $4,000** even though, when faced with Judge Nadler's refusal to allow a jury trial because the address of the property was put in the wrong place on Defendants' form UD-150, Defen-dants were willing to voluntarily leave the property). For fighting against this $4,000 unreviewable fees award for giving up, Defendants were eventually saddled with $10,000 in fees by Judge Rushing, even though *Santisas v Goodin* (1998) 17 Cal 4th 599, 614 states: "We are satisfied that concern for the efficient and equitable administration of justice requires that the parties be left to bear their own attorney's fees." *International Industries v Olen* (1978) 21 Cal 3d 218, 224-225 explains: "The purpose of litigation is to resolve participant's disputes, not compensate participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees."). (48:10-17)

10. Judge Rushing systematically flouted the Evidence Code to admit Exhibit #5

***World-Wide Volkswagen Corp. v Woodson* (1980) 444 U.S. 286, 292 *affirms that federal Due Process review ensures that a State procedural rule "does not offend traditional notions of fair play and substantial justice." (International Shoe Co. v Washington* (1945) 326 U.S. 316, 326**

quoting *Milliken v Meyer* (1940) 311 U.S. 457, 463.) *United States v Sanchez-Lima* (1998) 161 F.3d 545 cites Federal evidentiary standards: "Hearsay evidence sought to be admitted under Rule 807 must have circumstantial guarantees of trustworthiness equivalent to the listed exceptions to the hearsay rule. See United States v Fowlie, 24 F.3d 1059, 1069 (9th Cir. 1994). Furthermore, *the statement must (1) be evidence of a material fact; (2) be more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) serve the general purposes of the Rules of evidence and the interests of justice by its admission into evidence.* Fed.R.Evid.807."

Defendants knew from their one and only (April 12, 2007) telephone conversation with Charles Jensen, that his main reason for severing communications was to avoid discussing Plaintiff's reason's for eviction. After an unsuccessful two-month struggle to try to obtain the March 26, 2008 Report of the Homeowner's Association (alluded to but not provided in the 60-Day Termination Notice), Defendants suspected that Charles Jensen would try to sneak this Report in when it was too late for Defendants to effectively challenge its credibility. Therefore, Defendants tried to block introduction of what became Exhibit #5 in an off-the-record sidebar, and followed up at their first opportunity with a written motion to exclude the March 26 Report.

Defendants' rejected "Motion to Strike No-Notice Anonymous Evidence (Redacted Hearing Results)" provided (CR-835):

1. Anonymous evidence is precluded by the Sixth Amendment, and this is an element of Due Process in other contexts as well, binding on States via the Fourteenth Amendment.

2. Evidence withheld until the last minute, then disclosed too late in the trial process for any possibility of rebuttal evidence being gathered, is prejudicial and has no reliable probative value.

3. Defendants repeatedly requested this very piece of evidence, i.e. the results of the March 26, 2007 hearing, on several occasions after the February 20, 2007 Hearing Notice was attached to Plaintiff's complaint, and Mr. Charles Jensen adamantly refused to supply it.

Accordingly, for both evidentiary and procedural reasons, Plaintiff's Exhibit dated March 28, 2007 (containing Meadow Pines Homeowners Association Hearing Results) is hereby stricken from the Record. (CR-1240-1241)

Defendants' November 26, 2007 Transcript Appendix analyzes trial proceedings:

Judge Rushing [as part of document dump which Defendant described at the time: "They

> just dumped a pack of letters, undifferentiated, saying here's 24 letters, plop." (Transcript at 242:27-28)] admitted a report filled with third-hand hearsay: complaints made by un-specified persons, compiled into a report by an anonymous person, and put into evidence as a result of it being conveyed by a third person (not available for cross examination) who wrote on the bottom of the anonymous report "This was submitted by a neighbor." (Exhibit 5, filed by Defendants after trial at CR-144). However, when Michael Halliwell asked James Parker (Transcript at 299:21 to 300:6) about a communication to him by "Chris and Christine, the people who lived next door to me" he was not allowed to answer this question: "Did either of these people ever communicate with you that they received any satisfaction on this basic grievance?" Charles Jensen interrupted at this point, saying: "Objection, Your Honor. Any response will be hearsay." Judge Rushing responded. "Sustained." (CR-1239) (49:3 to 50:6)

Judge Rushing would not let Defendants go over most of the 1-page anonymous compilation of hearsay complaints in Exhibit #5, saying: "I have the right to control the means and manner, and also there's an Evidence Code section called 352 which prevents repetition and cumulative evidence and

things that are more time consuming than probative. The jury is only here for a limited time. We need to get through the rest of this case." This completed Judge Rushing's flouting of the rules against hearsay in Evidence Code Sec 1200 in this matter. At one point, Judge Rushing offered to explain her prior refusal to address the merits of Exhibit #5's admissibility (saying "We are going to stay on the record to permit the parties to place on the record anything that was said at sidebar that wasn't argued on the record.") However, after addressing all the other rulings where Defendants sought clarification, Judge Rushing brushed aside her admission of Exhibit #5, saying: "I'm not making any further rulings than that." (50:7 to 51:17)

> Although she had admitted to never having conducted an Unlawful Detainer jury trial, Judge Rushing seemed confident that she knew the proper way to handle one. Thus she said in her comments seeking to justify

rushing through the Motions in Limine phase of proceedings: "In unlawful detainer actions, the time frames are much more truncated than in any other civil litigation for many reasons. The Court is bound to follow those rules." (Transcript at 447:3-6) Here is what the California Supreme Court has said about the underlying principle here in *Green v Superior Court* (1974) 10 Cal 3d 616, 636:

> The landlord contends, however, that the recognition of such a defense will completely undermine the speedy procedure contemplated for unlawful detainer actions. In the first place, however, while the state does have a significant interest in preserving a speedy repossession remedy, that interest cannot justify the exclusion of matters which are essential to a just resolution of the question of possession at issue. As the Court of Appeal observed in Abstract Investment Co. v. Hutchison (1962) 204 Cal.App.2d 242, 249: "Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the 'tail wagging the dog.'" (CR-1255) (51:19 to 52:4)

After Charles Jensen slipped Exhibit #5 into evidence, as part of a 24-letter "document dump,"

Judge Rushing deferred a ruling on Defendants' written motion to exclude it. (She said, "We're going to put on the case. If there's a break, we can let them go later, and I can consider some papers if you would like.") Judge Rushing then refused to discuss this motion. (She said, "Mr. Halliwell, I have looked at your motion this morning, and I'm denying it. It's in evidence. It's going to remain in evidence, and that's my ruling. We do not need a sidebar." Judge Rushing totally disregarded the rationale for severe restrictions on hearsay evidence set forth in Witkin's California Evidence. ("The purpose of the 'hearsay rule' is to preserve a party's Sixth Amendment right to confront and cross-examine an adverse witness and to disallow testimony coming from a witness who is not under oath and whose demeanor cannot be observed by the trier of fact.") The "neighbor" who compiled these complaints about "Resident

1041" on the "WeekEnd of 2/17, 18/2007" does not refer to himself or herself in any fashion whatsoever. Moreover, the landlord answered "No" to this Question by Charles Jensen "Was there any other reason that you served the 60-day notice other than what's in that letter?" (52:5 to 53:9)

11. Judge Rushing used Evidence Code Sec 352 to vitiate Evidence Code Sec 1200

Every time Defendants tried to invoke procedural safeguards against the admission of unreliable evidence (such as the Sixth Amendment and Evidence Code Sec 1200), Judge Rushing ruled them out of order. In *World-Wide Volkswagen Corp. v Woodson* (1980) 444 U.S. 286, 291, the U.S. Supreme Court resolved a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States, by invoking the due Process Clause of the Fourteenth Amendment to overrule the Oklahoma High Court: "*A judgment rendered in violation of due process is void* in the rendering State and is not entitled to full faith and credit elsewhere." *Pennoyer v Neff* (1878) 95 U.S. 714, 732-733.

> Michael Halliwell tried to ask James Parker whether "there was any avenue whatsoever for you to get your side of this [complaint] into

the hands of the Homeowner's Association before they made their decision on this matter?" (Transcript at 285:4-7) Charles Jensen prevented James Parker from answering by intervening: "Objection, Your Honor. Relevance." (Transcript at 285:8) Judge Rushing ruled: "I'm going to sustain the objection." (Transcript at 285:9) Later in proceedings, Michael Halliwell tried to ask James Parker a question about the Homeowners' Association abuse of his Sixth Amendment rights, with a report where the names of all of his accusers had been redacted. Judge Rushing disallowed invocation of this additional part of the Bill of Rights, ruling: "It is irrelevant." (Transcript at 351:18) Michael Halliwell, in a tone of voice which must have clearly indicated his dismay at this turn of events, responded: "The Sixth Amendment is irrelevant. Fine." (Transcript at 351:19) Judge Rushing replied: **"You know what, Mr. Halliwell, I'm going to stop you from making those comments anymore in this courtroom. When I make a ruling that something is irrelevant, you don't comment to the jury that the Sixth Amendment is irrelevant, and I consider that contemptuous behavior. I won't tolerate it."** (Transcript at 351:20-25) (53:18 to 54:2)

This contempt threat violated *Baugess v Paine* (1978) 22 Cal3d 626, 638. (54:3-8)

Appellants' Opening Brief cites more unfairness by Judge Rushing re Exhibit #5:

After rejecting Defendants' motion to strike Plaintiff's anonymous compilation of hearsay complaints, Judge Rushing curtailed their right to discuss in detail the alleged defects of this Report. Michael Halliwell was eliciting testimony on this page of complaints from James Parker when he said: "Moving on to number B (of the second complainer being discussed)" (Transcript at 367:10). This was the second specific charge made by the last redacted name in the document (it is not clear how many different individuals were involved, four of the felt-tip cross-outs were of names of exactly the same length). At this point 16 lines of the 39 lines (CR-144) setting forth various complaints had been covered, the remaining 23 lines included ALL of the complaints made by persons whose locations were specified (CR-145) on an accompanying map.)

Judge Rushing cut in: "Is this the same thing we've just been over?" (Id. 367:10)

Michael Halliwell responded: "We've got the written documents going before the jury, and [Charles Jensen] would like to have them just look at it without us having any input from our side." (Transcript at 367:13-15) Judge Rushing continued: "I mean, you have already asked who he thinks wrote these things. He's done the best to try to figure it out." (Transcript at 367:17-19) Michael Halliwell explained his purpose: "I'm trying to tie together." (Transcript at 367:20) Judge

> Rushing ruled: "In the interests of time, I'm going [to rule this to be redundant under Evidence Code Sec 352] you can ask one more question on this, then we're moving on." (Transcript at 367:25-26) (CR-1336:12 to CR-1337:3) (54:9-22)

Immediately after Plaintiff's March 28, 2007 60-Day Notice to Quit referred to a March 26, 2007 Homeowner's Association hearing on complaints against James Parker, Defendants made inquiries to Plaintiff's counsel and the Homeowner's Association seeking the results of this hearing. Since it was obvious that Charles Jensen was holding this document in reserve, to present to the jury too late for Defendants to verify whatever charges it contained, we used Form Interrogatories 71.7 & and 77.1 to try to discover the findings of this March 26, 2007 hearing, and made Interrogatories 71.7 & 77.1 the focus of our Request to Bar Surprise Evidence. When Defendant Halliwell questioned Defendant

Parker about the unfairness of being accused by persons whose names were redacted, Judge Rushing ruled out this line of questioning, saying "It is irrelevant." (54:23 to 56:14)

> *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1354 notes that even **sworn** statements by persons not available for cross-examination in court are precluded by California Evidence Code Section 1200, because "declarations constitute hearsay and are inadmissible at trial." In oral argument in *Elkins*, Justice Kennard quoted language from *Goldberg v Kelly* (1970) 397 U.S. 254, 269 which affirms: "Where credibility and veracity are at issue, written submissions are a wholly unsatisfactory basis for decision." Thus Defendants cited (CI 1019) in opposition to allowing into evidence the **anonymous** compilation of hearsay complaints in Exhibit #5, a synopsis of such authorities in Concise Encyclopedia:
>
> > The creation of a body of rules for the exclusion of hearsay evidence was motivated by the arguments that such testimony could tend to mislead the jury, that the hearsay observer, unlike the legal witness, was not under solemn oath and was inaccessible to cross-examination, and that such testimony furnished third-hand evidence, and that it violated the best evidence rule (the

rule that the best version possible of a written document be submitted as evidence).

Elkins v Superior Court (2007) 41 Cal 4th 1337, 1364-1365 points out the harm caused by excessive rigidity in applying deadlines:

> For example, in *Hernandez v Superior Court* (2004) 115 Cal.App.4th 1242, 1246, the reviewing court held that the trial court abused its discretion in refusing, in reliance upon a local fast track rule, to reopen discovery. "Strict adherence to these delay reduction standards has dramatically reduced trial court backlogs and increased the likelihood that matters will be disposed of efficiently, to the benefit of every litigant. [Citation.] Here, the trial court's orders promote judicial efficiency by maintaining strict time deadlines. But efficiency is not an end in itself. Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. [Citations.] Accordingly, decisions about whether to grant a continuance or extend discovery 'must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring

> judicial efficiency.'" (CR-1479 to 1480) (56:15 to 57:8)

Charles Jensen used Exhibit #5 to accomplish the character assassination of James Parker, but Plaintiff's counsel tried to minimize its profile in the minds of a reviewing court, by abandoning his effort to prove any cause for the eviction.

> Judge Rushing referred to a Notice of Hearing, slated to take place on March 26, 2007, as noted by Plaintiff's March 30, 2007 Complaint, which said (CR-039): "PER THE ATTACHED, THIS TERMINATION IS FOR CAUSE." The attachment (CR-040) said "VIOLATION REPORTED: Ongoing threatening behavior of your tenant towards other residents." Judge Rushing turned to Charles Jensen and said: "**I notice that in your notice, you listed cause.**" (Transcript at 172:25) Charles Jensen responded: "*That is correct, Your Honor.*" (Transcript at 172:26) Judge Rushing asked: "**It that the theory you're proceeding on?**" (Transcript at 172:27-28) Charles Jensen answered: "*It is not, Your Honor, simply because the code section says no cause is needed.*" (Transcript at 173:1-2) Judge Rushing responded: "**Right.**" (Transcript at 173:3) (57:9-15)

12. Judge Rushing continues to evade crucial facts in handling attorney's fees

***Brinkerhoff-Faris Trust & Savings Co. v Hill* (1930) 281 U.S. 673, 678 affirms that administering a valid law in such a way as to violate Due Process standards, is a matter of Federal concern. Moreover, attempted procedural sabotage need not be successful to constitute obstruction of justice. *United States v. Silverman* (1984) 745 F.2d 1386, 1395 applies 18 U.S.C. § 1503: "*We must keep in mind that a section 1503 offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice*; the prosecution need not prove that the due administration of justice was actually obstructed or impeded. Osborn v. United States (1966) 385 U.S. 323, 333; United States v. Russell (1921) 255 U.S. 138, 143. An ordinary lawyer engaging in the conduct Silverman was charged with here would know that one of the scenarios we have portrayed would come to pass and would adversely impinge upon the due administration of justice, in violation of 18 U.S.C. Sec. 1503. "**

Judge Rushing NEVER allowed Defendants to secure a normal briefing process, and allowed Plaintiff's counsel to "cut corners" by ignoring the proper notice requirement of Local Rule 18.8, and

the consultation requirement of Local Rule 5.5.

(58:2-19)

> Attachment #2 is Judge Rushing's August 28, 2007 Tentative Ruling (issued in violation of Local Rule 2.2D) awarding $10,000 in attorney's fees because: "Defendant Parker did not oppose the motion. Defendant Halliwell filed some papers, but fees are not sought against him. Since he is not an attorney, he cannot represent or file opposition on behalf of Defendant Parker. Therefore, they are not being considered." Appellants' April 18, 2008 Petition for Mandamus to Clarify the March 6, 2008 Opinion (**at 11:19 to 12:11**) points out how half of the costs of defending against eviction, including attorney's fees, was borne by Defendant Halliwell under a cost sharing arrangement (whose validity was unquestioned). Appellants' April 18 Petition (**at 10:5-13**) also points out that Judge Rushing had previously accepted and granted a motion by Defendant Halliwell, for a continuance of the attorney's fees hearing, in spite of Plaintiff's challenge to Halliwell's standing to make such a motion.
>
> Attachment #3 is Charles Jensen's Proposed Judgment After Motion, which attempts to implement Judge Rushing's Tentative Ruling, by presenting this proposal directly to Judge Rushing's judicial assistant on August 30, 2007, and mailing it to Defendants, so that they would be unable to react until court

opened after the Labor Day Holiday on September 4, 2007 (see Appellants' April 18 Petition **at 10:14 to 11:19**). Charles Jensen knew that the basis for this Tentative Ruling was false (and indeed, in a motion to be heard by Judge Rushing on May 6, 2008, he is asking for $493 for reading James Parker's August 22, 2007 Opposition to the $10,000 fees award, which he claimed in his Judgment After Motion did not exist). (58:21 to 59:7)

Cooter & Gell v Hartmax (1990) 496 U.S. 384, 405 precludes using attorney fees as a punishment for a litigant's exercising his right to appeal trial court orders. (59:8-15)

Attachment #4 is Judge Rushing's Order of September 5, 2007, which was a temporary retreat in the face of the explicit terms of Local Rule 2.2D (quoted in full in Attachment #11) that "All law and motion matters in unlawful detainer actions shall be scheduled on the Unlawful Detainer Law & Motion Calendar" AND "No tentative rulings will be made available for matters on this calendar." Appellants' April 18, 2008 Petition (**at 14:8-17**) discusses how Judge Rushing tried to PREVENT James Parker from curing the "defects" of memoranda opposing an award of attorney's fees which were submitted by Defendant Halliwell, by resubmitting the same arguments in his own name. Her Order

of September 5 states: "No further papers of any kind will be permitted to be filed on this motion prior to the next hearing date of September 25, 2007." As Appendix B Transcript Analysis notes (at 6:15-16) when James Parker came to the September 25, 2007 hearing and said "I have some papers to put in, if I may?" Judge Rushing replied "No, it's too late for that, sir." (Transcript at 330:26-28)

After parroting Judge Rushing's false statement in her August 28, 2007 Tentative Ruling ("Defendant JAMES PARKER did not oppose the motion.") in his Proposed Judgment After Motion (CI 1462), Charles Jensen shifts ground in his October 27, 2008 Reply Brief (LNT 7:23-24), saying: "James Parker did not file an official opposition to the Motion for Attorney's Fees." This quibble about the wording on the face-sheet caption of James Parker's August 22, 2007 opposition (CI 1066-1117) might have been relevant only if mislabeling had caused Judge Rushing to overlook James Parker's filing. However, James Parker reminded Judge Rushing of his August 22, 2007 opposition on August 28, 2007 (CI 1240). By clinging tenaciously to an alleged "labeling defect" in James Parker's opposition as grounds for granting Charles Jensen's fees motion, Judge Rushing flouted the mandate of *City of Shasta Lake v County of Shasta* (1999) 75 Cal. App.4th 1, 11: "The law aspires to respect substance over nomenclature." (59:16 to 60:4)

Brinkerhoff-Faris Trust & Savings Co. v Hill (1930) 281 U.S. 673, 678 and its supporting authorities (*Greene v Louiseville & Interurban Railroad Co.* (1917) 244 U.S. 499, 507, 512-513 and *Sioux City Bridge Co. v Dakota County* (1923) 260 U.S. 441, 446-447), affirm Federal Due Process protection for substantive property rights under state law and Federal Equal Protection against discriminatory application of state law to similarly situated persons. (60:6 to 61:8)

13. Court files and briefing schedules have been manipulated to obstruct justice

In this context attorney's fees were the functional equivalent of sanctions, and their manner of imposition violated *In re Ames Department Stores, Inc.* (1996) 76 F.3d 66, 70, which observes: "Due Process requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." Justice Frankfurter points out in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 170: "*If the right to notice and a hearing is to serve its full purpose, then, it is clear that it*

***must be granted at a time when the deprivation can still be prevented.*" *Byrne & Manov v Nezhat* (2001) 261 F.3d 1075, Footnote 110, sums up § 1503 remedies: "In short, *rules and procedures designed to redress obstruction of justice are 'designed not only to protect participants in judicial proceedings but also to prevent miscarriages of justice.'* United States v Walasek (1975) 527 F.2d 676, 680."**

Our October 19, 2007 (Case File Status)

Petition to Clerk Supervisor Lewin says:

> Items #5, #6, #7 and #8 discuss how a straight-forward mandate for orderly briefing followed by a hearing on attorneys fees was distorted by Plaintiff's maneuvers to deprive Defendants of a meaningful opportunity to reply, **a)** followed by an indication that Judge Rushing was alerted by a court employee to what was going on with a "Post It" note saying "Watch out – This is **Blood**," **b)** followed by another note in the file calling attention to James Parker's August 22, 2007 "Review of Subterfuges Relating to Attorney's Fees," **c)** followed by the disappearance of this document from the Case File (along with all of Defendants' other filings between the "Watch out" note and the August 28, 2007 date of the rescheduled hearing on Attorneys Fees), **d)** followed by a Tentative Ruling granting the fees sought by Plaintiff's motion, based on the false premise that "Defendant Parker did not oppose the motion." (CR-994:9-19)

#6. On October 17, 2007 (Exhibit T-17) Defendants came across evidence of serious concern by a court employee about procedural issues which Judge Rushing was refusing to address. In the Case File on the Face Sheet of Michael Halliwell's July 26, 2007 Reply Affidavit Concerning Attorney Fees Motion Rescheduling, there is a Post-It note saying "Watch out – This is **Blood**." (CR-999:9-13)

#7. It is not clear to Defendants what Judge Rushing's reaction was to the aforementioned "Watch out – This is **Blood**" warning, but ALL DOCUMENTS (CR-352 to CR-484) FILED AFTER JUDGE RUSHING RESCHEDULED THE ATTORNEY'S FEES HEARING, AND BEFORE THE NEW HEARING DATE (August 28, 2007) have disappeared from the Case File, **and what was once volume #3 of the case file has been "written over" to become volume #2**.

The key document in what was volume #2, James Parker's August 22, 2007 Defendant's Review of Subterfuges Relating to Attorney's Fees (CR-374 to CR-425), has apparently not been overlooked by Judge Rushing. On the back of one of her cards in the folder for the new volume #2 someone named "Mia" has written "8/22" followed by the Greek letter delta with an "s" and "Review of Subterfuges Relating to Attorneys Fees James Parker." This notation has been superimposed on the Face Sheet of this August 22, 2007 Document

as Exhibit T-24. Here James Parker says, "This review amounts to a compilation of consistent and ongoing abuse and noncompliance with local court rules and state mandated judicial procedures by Plaintiff's attorneys." (CR-374:19-21) (CR-1000:20 to CR-1001:10) (61:18 to 62:13)

Judge Rushing's Order of September 5, 2007 (CR-599) claims to have "inadvertently failed to notice that it had previously stated that no tentative ruling would be issued and that appearances would be required for the hearing on plaintiff's Motion for Attorneys Fees." Michael Halliwell's Affidavit of September 25, 2007 comments on this claim:

> Judge Rushing said when she vacated her Tentative Ruling that she "inadvertently" overlooked that she had informed the parties that there would be no tentative ruling in the case. This inadvertence was deliberate since Judge Rushing certainly saw that Charles Jensen and the Defendants both showed up on August 28, 2007 expecting a hearing to take place. (We were in the front row and had announced our presence to the clerk in Courtroom 19.) Judge Rushing rearranged the order of the cases posted outside the courtroom that day, so that she called them one by one [and] all the cases listed after MCV 191306 were completed, before she called a recess

> and swiftly left the courtroom. When I stood up and clearly said "Your Honor," the bailiff demanded that I immediately go out into the hallway. I informed the bailiff that Judge Rushing's own order said that mandatory appearances would be required, and offered to show him the order. The bailiff went back and checked with Judge Rushing, and returned with an order that we leave the premises at once or be arrested. (CR-707 to CR-708) (62:18 to 63:3)

Judge Rushing was forced to vacate her August 28, 2007 Tentative Ruling because it was flatly contrary to Local Rule 2.2D, so Judge Rushing issued an order on September 5, 2007, to bar James Parker from rectifying the supposed defects in filings identified in the August 28th order. Such actions are contrary to *Baker v Carr* (1962) 369 U.S. 186, 204, which notes the importance of vigorous advocacy in the judicial process. (63:4-17)

Boddie v Connecticut (1971) 401 U.S. 371, 377 notes that anyone who faces a loss of liberty or

property as a direct result of court action has a right to be heard:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or property, there he may defend." Windsor v McVeigh (1876) 93 U.S. 274, 277. (63:18-23)

Boddie v Connecticut (1971) 401 U.S. 371, 377 and *Serrano v Unruh* (1982) 32 Cal 3d 621, 635 require a meaningful opportunity for litigants to defend statutory rights and bar the use of legal fees as a club to inhibit the voicing of legitimate objections to infringements of these rights. (63:24 to 64:9)

Judge Chouteau's May 23, 2008 Orders are biased in timing and content

Is it a coincidence that Judge Chouteau issued his Orders of May 23, 2008, two days before the deadline for input from Respondent in Appellants first appeal to the California Supreme Court? The subject matter of these orders was apparently decided upon many weeks before the orders were filed. They all relate to questionable aspects of the handling of the attorney fees issue. The first motion disposed of cited inconsistencies between the policy recognized in Judge Chouteau's Order of February 5, 2008 regarding the essential ingredients (transcripts and chronological index) required before a proper briefing process can commence. It noted the absence of the September 25, 2007 hearing transcript (Order of March 6, 2008 at 1:25-27), and the fact that the Order of March 6, 2008 (at 4:2-11) purported to affirm a fees award made on September 25, 2007 (which itself is entirely unexplained). This happened in spite of seeming assurances to contrary (made at the January 24, 2008 hearing and cited at 3:2-8 of the analysis of that transcript, which is included in Defendants' May 27, 2008 Notice of Appeal). Lacking the courage to squarely address this matter, Judge Chouteau wrote in his order on this subject, that Defendants' motion "was denied by operation of law on April 5, 2008, pursuant to CRC 8.708." The second motion dealt with a change in policy, under which Defendants had been allowed to file serially numbered duplicate copies of all filings in the case, as part of their designation of the record on appeal, to protect against the

sort of ex post facto insertions (of a Plaintiff's Proof of Service and Form UD-150, CR-129 & 130, CR-131) which had been absent from the file from June 11, 2007 through June 21, 2007 (as noted in filings at CR-026, CR-054, CR-063, CR-073 and CR-088) as if they had been filed on June 6, 2007. Without saying what issue is involved, Judge Chouteau's order simply says, "Appellant's Petition re No-Notice Change is denied." The third motion sought separate hearings where the violations of Local Rules 2.2D (August 29, 2007 Appeal), the use of a September 5, 2007 filing ban to preclude rectifying an alleged lack of opposition to Plaintiff's fees motion (which was granted on September 25, 2007 and appealed the next day) and file tampering (October 17, 2007 Appeal), could be effectively scrutinized. Judge Chouteau's order was not issued in a timely fashion, and when it was filed it too late for effective recourse Defendants learned that that the Appellate Branch had ruled "Appellant's Petition for Separate Hearings is moot and is denied on that basis." (64:10 to 65:3)

14. Judge Rushing sought ineffective advocacy, in denying right to conduct own case

Judge Rushing brushed aside federal governing *jus tertii* precedents (such as *Powers v Ohio* (1991) 499 U.S. 400, 410-411 and *Singleton v Wulff* (1976) 428 U.S. 106, 112-116, which would have allowed Michael Halliwell to defend against his indirect injury (arising from any fees obligation falling on James Parker as a

result of their having been evicted together), even if both Defendants were not still parties in *Paxinos v Halliwell & Parker*. However, she went beyond this to vitiate Defendants' right of self representation affirmed in *Faretta v California* (1967) 422 U.S. 806, 812-813 and the mandate of *Gray v Justice's Court* (1937) 18 Cal. App.2d 420, 423: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.*"

Throughout proceedings before Judge Nadler and in proceedings before Judge Rushing up to August 28, 2007, Defendants' right to conduct their own case was respected. After Judge Rushing's switch from ruling favorably on Defendant Halliwell's motion for rescheduling a fees hearing, to invalidating everything Halliwell had filed with respect to the fees issue, Defendants submitted proof (which remains unchallenged) that both Defendants faced the same potential financial injury from any fees award. (65:13 to 66:12)

In *Powers v Ohio* (1991) 499 U.S. 400, 410-411

the U.S. Supreme Court set out a succinct three pronged test which must be satisfied to assert *jus tertii* standing:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *Singleton v Wulff* (1976) 428 U.S. 106, 112; the litigant must have a close relation to the third party, *Singleton* 428 U.S. at 113-114; and there must exist some hindrance to the third party's ability to protect his or her own interests. 428 U.S. at 115-116. See also *Craig v Boren* (1976) 429 U.S. 190.

The *Powers* Court explains its ruling in support of *jus tertii* standing:

> Both the excluded juror and the criminal defendant [Powers] have a common interest in eliminating racial discrimination from the courtroom.... This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venireperson's rights. (499 U.S. at 413-414.) (66:14-24)

Judge Rushing cited no authority for her restrictive concept of standing, which was so sweeping that she would not even let Defendant Halliwell point out why he had standing. After repeatedly interrupting Defendant Halliwell, when Defendant James Parker yielded to him (so that he could address aspects of the case he had been in charge of), Judge Rushing proclaimed: "I am sorry, Mr. Halliwell, I'm not going to permit you to say anything in this argument at this hearing."(66:25 to 68:4)

> Charles Jensen concedes that Defendant Michael Halliwell is adversely affected by any attorney fees award to Plaintiff (LNT 3:9-11), as he dismissively observes: "as they state ad nauseam throughout their papers they apparently have some sort of arrangement between them for Mr. Halliwell to pay ½ of the judgments and orders in this case." The significance of this agreement is addressed in Defendants' Request for Reporter at July 21, 2008 OEX hearing (at CI 4647-4648):
>
> Having fully satisfied the injury-in-fact requirement (because of Defendants' 50%-50% cost sharing arrangement, which antedated

any standing challenge) and closeness of relationship requirement (having been evicted together) of *Singleton v Wulff* (1976) 428 U.S. 106, 112-113, the third requirement of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114, eliminated any basis at all for precluding Michael Halliwell's continuing to defend his own interest in the fees issue (exactly the same as James Parker's): "*The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.*" (68:6-14)

15. Judge Chouteau has ignored precedents re standing to appeal standing

There are broad (*Warth v Seldin* (1975) 422 U.S. 490, 504) and specific situation (*Craig v Boren* (1976) 429 U.S. 190, 195) precedents which affirm standing to defend against indirect injuries, which Judge Chouteau brushed aside without even being willing to discuss them. Even worse, Judge Chouteau trashed *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552 by denying any opportunity for Defendants to be heard on the appeal standing issue "at a meaningful time and in a meaningful manner."

At the September 25, 2008 Appeal hearing, Judge Simonds praised Judge Rushing's handling of the standing issue, saying: "I thought Judge Rushing

addressed that pretty clearly." However, when James Parker asked: "May I respond to that, Your Honors?" Judge Simonds replied: "No. It's not an issue to be responded to. That's a statement of the facts." The only justification that Judge Rushing had offered for her standing ruling on September 25, 2007 was: "The statements I have just made are in the law library in all the practice books." Judge Rushing would not allow James Parker any preparation time before being required to stand alone in opposition to Plaintiff's $10,000 fees motion. Her reasons for this were that James Parker should have been prepared in light of Plaintiff's July 28, 2007 challenge to Defendant Halliwell's standing to bring a motion seeking a continuance of the scheduled July 31, 2007 fees hearing (which Judge Rushing had granted) and a statement questioning Dr. Halliwell's stake in the fees issue (in her Tentative Ruling of

August 28, 2007, which Judge Rushing had vacated).

(68:22 to 71:14)

> There is no clearer proof that ineffective advocacy is what Sonoma County Superior Court judges are looking for, than the way in which unanimous governing precedents have been swept aside by Judge Chouteau and his colleagues, with respect to Defendant Michael Halliwell's status as an aggrieved party concerning the standing issue (who is therefore entitled to fully participate in the fees hearing). If there were any basis for Judge Rushing's standing ruling, the Appellate Branch would surely have cited it in one of their orders upholding her attorney's fees rulings, since this has been the dominant determinant of fees proceedings below. The correctness of a ruling below is something to be examined in the appeal process, not to be assumed from the outset. The English language does not get any clearer than this passage from *Conservatorship of Stewart* (1969) 276 Cal.App.2d 211, 215: "**In other words, a party is 'aggrieved' by an order, within the meaning of section 902, even if his grievance turns out to be legally without merit.**"
>
> In fact, Michael Halliwell did NOT acquire standing by volunteering to pay half of James Parker's legal bills. Dr. Halliwell paid his $180 and became a Defendant in this case, because the only alternative was to be evicted

> automatically. It is his major role in the eviction proceedings (which was the foundation for all the attorneys' fees being sought in this case) which gives him the "close relation" to his co-defendant that satisfies one of the three prongs of the *Powers v Ohio* (1991) 499 U.S. 400, 410-411 *jus tertii* standing test. It is putting it mildly to say that James Parker faces "some hindrance" in defending the conduct of legal proceedings managed by his co-Defendant. This satisfies another prong of the *Powers* standing test. It is undisputed that the cost sharing agreement between co-Defendants PRECEDES any fees award, and it is just as binding as any obligation to pay attorney's fees James Parker may be thought to have under the rental agreement. Michael Halliwell has already suffered a $5,059 "injury in fact" on account of the trial court's first fees award, and he faces a tripling of this burden if Judge Rushing's $20,720 fees award is ultimately upheld. Judge Rushing got it totally wrong when she shut a party, who meets all three of the *Powers* standing criteria, out of participation in the fees aspect of the case because "He doesn't have the right to this motion. He's a stranger." (Transcript at 475:18-19) (71:15 to 72:6)

Nelson v Adams (2000) 529 U.S. 460, 464 clearly supports the right of Defendant Halliwell to state his side of the standing argument. *Varian*

Medical Systems, Inc. v Delfino (2005) 35 Cal 4th 180, 198-199 and its supporting authorities affirm that "the remedy by appeal cannot be denied to an aggrieved party dissatisfied with the judgment or the order appealed from."(72:7-23)

16. Charles Jensen and Judge Rushing cooperate to evade CCP Sec 703.580(a)&(c)

***Fuentes v Shevin* (1972) 407 U.S. 67, 80 affirms a fundamental legal principle: "For more than a century, the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard.' Baldwin v Hale (1863) 68 U.S. 223, 233. See Windsor v. McVeigh (1876) 93 U.S. 274; Hovey v. Elliott (1897) 167 U.S. 409; Grannis v. Ordean (1914) 234 U.S. 385. . . . . The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions." By concealing until the November 20, 2007 hearing, Plaintiff's grounds, a fallacious attack on the liberal interpretation of Notices of Appeal required by CCP Sec 8.750(a), for opposing James Parker's Claim of Exemption, Charles Jensen deprived Defendant of a meaningful opportunity to be heard on this issue.**

Michael Halliwell "seeks only the right to

> contest on the merits his automatic personal liability for fees which were originally sought and awarded solely against [someone else.]" Your Honors, that would be me. *Nelson v Adams* (2000) 529 U.S. 460, 472 authoritatively continues: "That right, we hold, is just what due process affords him." Michael Halliwell has NO OTHER LEGAL WAY to avoid paying $10,360 in legal fees other than the reversal of Judge Rushing's May 6, 2008 fees award. Respondent's position here is the same as the rejected position of the Respondent in *Nelson v Adams* (at 464): "[Adams] did not explain why Nelson, once joined as a party, should not be permitted to state his side of that argument."
>
> At the May 6, 2008 hearing Judge Rushing ruled: "I will permit you, Mr. Parker, to make whatever arguments you wish, but not Mr. Halliwell." I responded: "Since the Court has never cited any case law as to why Michael Halliwell has not been allowed to speak, I would ask the Court to cite some case law as to why not." But Judge Rushing ruled: "I am not required to do so and I decline that request." (Transcript at 4:21 to 5:14) (73:10-18)

Warth v Seldin (1975) 422 U.S. 490, 504

affirms indirect injuries as a basis for standing, and

Singleton v Wulff (1976) 428 U.S. 106, 113-114

affirms that standing rules are designed to assure

the defenders of legal rights in court proceedings are "the most effective advocates of those rights." (73:19-24)

James Parker also cited another aspect of Charles Jensen's effort to deprive him of a fair hearing: "In his opposition, he stated no argument [against my claim of exemption]. He just stated he was opposed to it." (Transcript at 481:8-14). In Defendants' appeal from similar tactics used by Charles Jensen earlier in the case, their December 24, 2007 brief cited *Hall v Superior Court* (2005) 133 Cal. App.4th 908, 918-919 where the Court of Appeal rejected similar procedural maneuvering which "places an unduly onerous burden on defense counsel to do all that is required within such a short period of time." *Hall* notes: "Court rules should be designed to accomplish the ends of justice, to protect rights, and to implement the substantive law. When a policy, practice, or rule operates instead to defeat these purposes, and deprives an accused of a fair trial or determination on the merits, then the policy, practice or rule must give way." (CI 2726:9-20) James Parker asked for a modicum of fairness at the November 20, 2007 hearing: "Defendant has a right to know what the argument is ten days in advance of any hearing so that he can supply a written opposition to whatever the – Mr. Jensen's argument is." Judge Rushing responded: "Wrong. Wrong sir. Wrong. I just

told you the only pleadings on a claim of exemption are the claim of exemption and the opposition and that's it." (Transcript at 481:15-21) The Conclusion of James Parker's June 2, 2008 brief in Support of His November 21, 2007 Appeal protests (at 15:10-22):

> **Judge Rushing exercised her discretion over the conduct of proceedings in a way that violated *Jennings v Superior Court* (1967) 66 Cal 2d 867, 875-876, which holds that "discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." In fact, Judge Rushing seemed intent on following in the footsteps of the trial judge in *Gamet v Blanchard* (2001) 91 Cal. App.4th 1276, 1283 who was criticized by the Court of Appeal: "The judge's comments that he could 'jam' Gamet and that he wanted to 'keep the heat on,' when combined with the unexplained judgment dismissing the action shortly thereafter, seem arbitrary and created the appearance of substantial unfairness."**

In setting aside CCP Sec 703.580(a) which allows amendments "in the interest of justice" and CCP Sec 703.580(c), which allows "production of other evidence,

oral or documentary" in Exemption Claim proceedings, Judge Rushing herself was "wrong, wrong, wrong." (74:1-19)

Judge Rushing vitiated the liberal construction of Notices of Appeal in favor of their sufficiency, which is mandated by CRC Rule 8.750(a) and the explicit holding of *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997 (that a notice of appeal is effective when filed after a court announces its intention to award a judgment, but before the court's order is promulgated). (74:20 to 75:13)

Charles Jensen at no point (not in his Opposition to Claim of Exemption as required by CCP Sec 703.560, not at the hearing on the claim of exemption, nor in any subsequent filing) alleged that the bank account being levied was not exempt from attachment for a judgment consisting solely of costs and/or attorney's fees as provided in CCP Sec 917.1(d) as applied (see CR-1453 to CR-1457) by *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655; *Nielsen v Stumbos* (1990) 226 Cal.App.3d 301, 303; and *Vadas v Sosnoski* (1989) 210 Cal.App.3d 471, 474-475). CHARLES JENSEN'S BARE STATEMENT THAT THE CITED STATUTE AND SUPPORTING

AUTHORITY "DO NOT APPLY TO JAMES PARKER" ALSO CLEARLY FAILED TO SATISFY HIS OBLIGATION UNDER CCP Sec 703.560(b) requiring that his Opposition shall include: "A statement of the facts necessary to support the allegation." (75:14-20)

17. Judge Rushing acted without jurisdiction to enforce her fees judgment

***Nelson v Adams* (2000) 529 U.S. 460 U.S. 460 comes close to being directly parallel to Defendant Halliwell's situation in *Paxinos v Halliwell & Parker*. The Supreme Court observed: "Nelson seeks only the right to contest on the merits his automatic personal liability for fees which were originally sought and awarded against [someone else.]" (460 U.S. at 472) *Nelson* affirms: "That right, we hold, is just what due process affords him." (Id.) Once Nelson became a party, his situation was virtually the same as Defendant Halliwell's, as *Nelson* notes: "[Adams] did not explain why Nelson, once joined as a party, should not be permitted to state his side of that argument." With no possibility of legally getting out of the corner she had painted herself into, without reversing her decision, Judge Rushing decided to operate off the record in defiance of the law.**

Judge Rushing's unrecorded actions on

November 26-27, 2007 to circumvent Defendants'

November 21, 2007 Notice of Appeal and Claim of

Exemption, vitiated *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655, which precludes enforcement of a judgment "limited to costs, including attorney's fees" while an appeal is pending. (75:21 to 76:3, 78:9-12)

Judge Rushing ignored Defendant Halliwell's "right to contest on the merits his automatic personal liability for fees which were originally sought and awarded solely against [someone else]." (*Nelson v Adams* (2000) 529 U.S. 460, 472) James Parker protested: "Since the Court has never cited any case law as to why Michael Halliwell has not been allowed to speak, I would ask the Court to cite some case law as to why not." But Judge Rushing ruled: "I am not required to do so and I decline that request." (76:12-25)

> Respondent's effort to deny standing just because Defendant Halliwell is indirectly damaged by an award against Defendant

Parker, is squarely rejected by *Warth v Seldin* (1975) 422 U.S. 490, 504, which affirms: "The fact that harm to petitioners may have resulted indirectly does not, by itself, preclude standing." In trying to force Defendants to "change horses in the middle of the stream" with respect to aspects of the case for which Defendant Halliwell had primary responsibility, Charles Jensen and Judge Rushing are clearly attempting to force ineffective advocacy of Defendants' position on the fees issue. This is a direct violation of the mandate of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114: "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them."

The notion that Defendant Halliwell cannot appeal Judge Rushing's ruling denying him standing is squarely rejected in *20th Century Insurance Co. v Choong* (2000) 79 Cal.App.4th 1274, 1277. The *Choong* opinion says: "Because Drum is obliged to reimburse Collins for the sanction if it is upheld on appeal, Drum's 'rights or interests are injuriously affected' by the sanction order and his interest is 'immediate, pecuniary and substantial.'" Furthermore, *In re Catherine H* (2002) 102 Cal.App.4th 1284, 1294 is completely unambiguous on the right to appeal a trial court's denial of standing: "Even if [Appellant] did not have standing below, she would still be aggrieved by the trial court's ruling that she did not have standing. Thus, she would still have

standing to appeal." (The opinion cites Code of Civil Procedure, Section 902 & *Conservatorship of Stewart* (1969) 276 Cal.App. 2d 211, 215.) *In re Catherine H* concludes: "Any other approach would improperly conflate standing to appeal with the merits." (77:1-14)

Aries Development Co. v Coastline Coastal Zone Conservation Commission (1975) 48 Cal.App.3d 534, 542 and its supporting authorities specifically hold that the right to appeal directly accrues from a trial court's ruling that a party lacks standing with respect to a motion. (77:15-19)

Also, in addition, *United Investors Life Insurance Co. v Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303-1304 cites *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736 and numerous other authorities in support of its holding that "an appellate court has *jurisdiction* to determine whether a party has standing in prior proceedings. Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure Section 902." (77:20-23)

The Order of November 17, 2008 does not provide any justification for the Appeal Panel's

refusal to allow the standing issue to be argued in accordance with the clear mandate of *Conservatorship of Stewart* (1969) 276 Cal. App.2d 211, 215 (cited in support of rehearing):

> The respondent urges us to dismiss the appeal, arguing that, since the order did not and could not, affect Omansky's rights as against either Mr. Stewart or The Bank of California, he is not a "person aggrieved" with the meaning of section 902 of the Code of civil procedure. But the order dismissed him as an objector. We that that, although Omansky was not an authorized objector, he had, and has, a right to have his status determined. . . . In other words, a party is "aggrieved" by an order, within the meaning of section 902, even though his grievance turns out to be legally without merit. (77:24 to 78:7)

In OEX proceedings Judge Boyd agreed with Parker's interpretation of *Ziello*:

> As it does appear that the judgment debtor has filed an appeal of that award, pursuant to the authority of Code of Civil Procedure section 916, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed upon. Pursuant to Code of Civil Procedure section 917.1(d) no undertaking is

> required when seeking a stay of an enforcement for costs. (Order of July 23, 2008 at 2:9-13)

In a similar case, *Nielson v Stumbos* (1990) 226 Cal.App.3d 301, 303, explains:

> **We are called upon to determine whether enforcement of the award of attorney fees, together with other costs, is automatically stayed by the taking of an appeal. Resolution of that question hinges on whether attorney fees recovered pursuant to a contractual provision are an element of costs when, as here, respondent has not recovered money damages. We conclude that in such a case the fees are costs, and that filing of a notice of appeal stays execution without the posting of an undertaking."** (78:13-22)

18. Procedural evasions by Appellate Branch to minimize scrutiny of the fees issue

The fact that half of the burden of any fees award in *Paxinos v Halliwell & Parker* falls automatically on Defendant Michael Halliwell, is the reason he has standing to try to prevent this adverse consequence. The United States Supreme Court squarely rejects Respondent's effort to divorce standing from potential injury. Thus *Baker v Carr* (1962) 369 U.S. 186, 204 gives this bedrock definition of standing:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law." **Defendants not only alleged an equal personal stake in the fees issue for both Defendants, they documented their two-way cost sharing arrangement.**

At their January 24, 2008 hearing, the Appellate Branch seemed to agree not to consider rulings at hearings whose transcripts were not part of the record before the court. However, the subsequent order of March 6, 2008 purported to decide the entire issue of Judge Rushing's $10,000 fees award (where the hearing transcript became available too late to be addressed in briefing), by adopting this false statement made in Respondent's Brief: "James Parker never opposed the motion for attorney fees." (79:7-20)

On September 25, 2008, Appellants had no

real opportunity to argue their case.

Judge Chouteau made a broad attack on Defendants' right to present their case:

> #1: Judge Chouteau said: "Now at this time, this is an appeal at least of an attorney's fees award against Mr. Parker, not against Mr. Halliwell." *Warth v Seldin* (1975) 422 U.S. 490, 504 provides: "The fact that harm to petitioners may have resulted indirectly does not, by itself, preclude standing."
>
> #2: Judge Chouteau continued: "Mr. Parker do you wish to add anything." James Parker responded: "Yes. I would like to have Mr. Halliwell speak." Judge Chouteau responded: "He cannot argue on your behalf. He is not an attorney." In *Craig v Boren* (1976) 429 U.S. 190, 195 the beer manufacturer had the right to argue, in behalf of his interest in increasing beer sales, the right of his potential customers to gender equality in the drinking age.
>
> #3: Judge Chouteau said to James Parker: "If you want to present something in addition to your papers, you may do that." James Parker responded: "Okay. Since I did not expect to be the one to talk, I would like to read my argument into the record." Judge Chouteau replied: "No. You may

not read an argument. Sir, if you have additional information to provide in addition to your briefs, you may do so. I don't want you simply reading something Mr. Halliwell prepared." Even in the absence of cognizable *jus tertii* standing, *Ehret v Ichioka* (1967) 247 Cal.App.2d 637, 640-641 allows one co-defendant to render clerical help and librarian-type direction to the other.

#4: Judge Chouteau proclaimed: "Gentlemen, this is a procedure in which the formality should be observed. Filing two briefs under the pretext of there being two separate parties and then simply having the briefs continue is not acceptable." Judge Chouteau's no-notice change in the degree to which he was willing to allow Defendants to minimize the overlapping of their briefs, constituted a hindrance (within the use of this term in the third prong of the *Powers v Ohio* (1991) 499 U.S. 400, 410-411 *jus tertii* standing criteria) to Defendant Parker to present his case effectively. Both Halliwell and Parker were still parties to the case, and their separateness was a result of an action taken by Judge Rushing (which was a main focus of the appeal).

#5: Judge Chouteau told Defendants: "It's not acceptable for you to trade arguments and read written argu-

> ments." Why was Defendant Parker's relationship with his co-defendant who presented the case in trial proceedings (which was the basis for all but the baseline $375 allowed by Local Rule 2.2E, of the $10,000 in attorney fees awarded by Judge Rushing to Charles Jensen) less close than the link between Defendant Powers and the black potential juror rejected on account of racism, in terms of the second prong of the *Powers v Ohio* criteria? If the Defendants were to be forced to "change horses in the middle of the stream" as Judge Rushing insisted, what is wrong with quoting transcript language which shows that this action by the trial court judge violated governing precedent? (See Transcript 3:15 to 4:6) (79:21 to 80:22)

Respondent tries to gloss over the cryptic statement that the precedent and statute cited by Defendants "does not apply to James Parker" (which constituted the only reason he ever gave prior to the November 20, 2007 Claim of Exemption Hearing), by saying in his Opposition Brief: "*There was no deliberate obscurity in the Opposition to the Claim of*

Exemption." Respondent refused to respond to clarifying interrogatories filed by Defendants before the November 20th hearing, and thereby defeated Defendants' right (under *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552) to a hearing conducted "at a meaningful time in a meaningful manner." (80:23 to 81:13)

19. Judicial tolerance of (or participation in) file tampering eliminates justice

The viability of grievances said to be moot (as Judge Chouteau proclaimed in his Order of May 23, 2008 with respect to Defendants' motions for non-overlapping consideration of appeals), are as strongly supported under the Federal version of "capable of repetition, yet evading review" (*Moore v Ogilvie* (1969) 394 U.S. 814, 816) as in California State law. Moreover, both the repetition and the evasions continue in the "two front squeeze" problem which have afflicted Defendants' appeals. *United States v. Neiswender* (1984) 590 F.2d 1269, 1272-1273 deplores obstructionism: "The federal obstruction of justice statute, 18 U.S.C. § 1503, provides in relevant part: 'Whoever ... endeavors to influence, obstruct, or impede the due administration of justice, shall be fined not more than $5,000 or imprisoned not more

than five years or both.' ... The state-of-mind requirement of § 1503 has long confused the courts. .... We see no need to undertake an extended excursion into the subtleties of specific intent. In our view, the defendant need only have had knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts."

Defendants raised the file tampering issue in their October 19, 2007 Notice of Appeal and paid the usual fee for so doing. Judge Chouteau stonewalled (refused to allow any briefing) this appeal and stonewalled (by waiting to rule on this issue until it allegedly became moot) Defendants' motion for a hearing their October 19, 2007 appeal. See Judge Chouteau's order signed and dated on April 18, 2008, but not filed until May 23, 2008, which is Exhibit P-4 of Defendants' December 5, 2008 Appendix to Motion for a rehearing which Judge Chouteau also stonewalled, until he denied it on January 5, 2009 (too late for this action to be cited in Defendants' January 2, 2009 Mandamus Petition). The issue of file tampering is certainly an "issue of substantial public interest, which is capable of repetition, yet evades review" and so should be adjudicated BEFORE Defendants are financially punished for trying to bring this matter to the attention of higher courts. (See *In re Natasha A.* (1996) 42 Cal.App.4th 28, 38 and cases cited therein.) **The issue of**

file tampering became a crucial matter of great concern to Defendants, after Charles Jensen and Judge Rushing collaborated in an "off-the-record" turning over of $10,118 of their assets to Charles Jensen, which the Sheriff's Department was extremely reluctant to clarify. (81:25 to 82:8)

Defendants' October 22, 2007 "Petition to Appellate Clerk Supervisor Donald G. Lewin Regarding the Case File" notes in **7a)** the launching of Respondent's effort to circumvent the protection against asset seizure of *Ziello v Superior Court* (1999) 75 Cal.App.4th 651 and CCP Sec 917.1(d), to open a "second front" to disrupt Defendants' ability to prosecute their pending appeal. **7b)** notes the obscurity of Charles Jensen's grounds for further prosecution of his $10,118 "money grab" and that this enforcement activity should have been blocked by Defendants' November 21, 2007 Notice of Appeal. **7c)** notes the added harassment arising from

Charles Jensen's efforts to limit Defendants to less than the 10 days notice they were entitled to before the Claim of Exemption Hearing. **7d)** notes that Judge Rushing's (and Charles Jensen's) failure to provide a signed order when the vacated $10,000 fees award was reinstated, resulted in a December 24, 2007 deadline for appealing this judgment. (Defendants unambiguously met this deadline with their November 21, 2007 Notice of Appeal, which eliminated the Court's specious objections to Plaintiff's two previous appeals of the $10,000 fees judgment.) **7e)** notes that there was nothing in the file indicating any court response to Defendants' November 21, 2007 Notice of Appeal and Claim of Exemption, or that Defendants' $10,118 was not still in the Sheriff's holding account, when Defendants inspected the Case File in December. However, a remark by Charles Jensen at the January 24, 2008

Appeal Hearing caused Defendants to suspect that their $10,118 had been turned over to Jensen. 7f) notes (i) that no action was taken with respect to the $10,118 by Judge Rushing until after the long Thanksgiving Day weekend; (ii) that when Judge Rushing returned to work on Monday November 26, 2007, she must have seen Defendants' renewed appeal from her order of September 25, 2007 (this order has never been provided to the parties, but was simply signed and placed in the Case File); (iii) that there are NO entries in the case file later than 11/05/2007 and before 12/07/2007 dealing with Judge Rushing's contacts with the Sheriff's Department (by which she turned over Defendants money on November 26th or 27th) and Judge Rushing certainly never informed Defendants of her actions on November 26th or 27th with respect to the $10,118 in the Sheriff's holding account (and the Sheriff's Department

for many months refused to provide any details about this action, saying only "check the court file").

(82:12 to 84:10)

20. Judicial evasiveness may be the most pernicious form of judicial absolutism

The bedrock governing precedent which forms the basis for judicial review of all violations of Constitutional rights makes clear, as *Baker v Carr* (1962) 369 U.S. 186, 208 reaffirms by citing it, "*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.*" (*Marbury v. Madison* (1803) 5 U.S. 137, 163). It is simply untenable to suppose that, the indirect injuries ruled cognizable in *Powers v Ohio* (1991) 499 U.S. 400, 410-411, in *Singleton v Wulff* (1976) 428 U.S. 106, 112-116, and in *Craig v Boren* (1976) 429 U.S. 190, 195 are any more linked to the Plaintiff's interests there, than the burden of legal fees in *Paxinos v Halliwell & Parker* is to Defendant Halliwell's interests. Decisional law of this sort demands judicial respect, as *Hart v Massanari* (2001, 9th Cir.) 266 F.3d 1155, 1170 affirms:

> **Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, case law on point is the law. If a court must decide an issue governed by a**

> **prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so... A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must.**

Judge Chouteau and his Appellate Branch colleagues have refused to address the "appeal standing" issue in any of their orders. Whether or not the Appeal panel agrees with *Warth v Seldin* (1975) 422 U.S. 490, 504 ("The fact that harm to petitioners may have resulted indirectly does not, by itself, preclude standing."), it is difficult to see why (as a matter of fundamental fairness) the panel did not allow Defendant Halliwell to explain why his equal financial jeopardy from any fees award did not give him sufficient stake in the outcome of the fees

issue to support standing. Also, fundamental fairness seems to preclude forcing Defendants to "change horses in the middle of the stream" without any warning or supporting authority. (84:25 to 85:17)

Charles Jensen concedes that Defendant Michael Halliwell is adversely affected by any attorney fees award to Plaintiff, as he dismissively observes: "as they state ad nauseam throughout their papers they apparently have some sort of arrangement between them for Mr. Halliwell to pay ½ of the judgments and orders in this case." Since the factual basis for standing is firmly established, there is a clear obligation of anyone who seeks to interfere with how Defendants manage their own case, to find some authority which counters the governing precedents cited by Defendants (*Powers v*

Ohio (1991) 499 U.S. 410-411 and *Singleton v Wulff* (1976) 428 U.S. 106, 112-114). (85:18 to 86:7)

> The concept of self-insurance is as valid as any other form of insurance where various risks are spread among a wider population than directly suffers a loss. The Appellate Branch silenced Defendant Halliwell (rather than allowing him to explain why he had standing in their proceeding as an aggrieved party) because they fully understood that a cooperative defense is the only possible effective defense that two self-represented litigants could offer against a case being presented by an experienced unlawful detainer attorney. Just as Defendant James Parker did not allow his co-defendant to be intimidated by Charles Jensen's threat of sanctions Halliwell would have to fully pay himself, Defendant Michael Halliwell did not ask his co-defendant to face the intimidating prospect of fully paying Plaintiff's attorney for the time Jensen spent on the case.

Gamet v Blanchard (2001) 91 Cal.App.4th 1276, 1283 grants Gamet relief:

> > We conclude there was an abuse of discretion because of a combination of events. Nowhere in the record is there any indication the trial judge gave any consideration to Gamet's alleged personal and family traumas. The judge's comments that he could "jam" Gamet

> and that he wanted to "keep the heat on," when combined with the unexplained judgment dismissing the action shortly thereafter, seemed arbitrary and created the appearance of substantial unfairness. While keeping cases moving through the court system and preventing unreasonable delay is certainly an important goal, it is a goal meant to serve justice by resolving disputes as speedily as possible. When disposing of cases becomes an end in itself, justice and fairness can easily fall by the wayside, and it appears that is what happened here. (CR-755:21 to CR-756:9)

Estate of Buchman (1954) 123 Cal.App.2d 546, 560 affirms:

> Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without a hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly and deliberate method

> by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence where the truth lies, application of the appropriate laws to the facts found, and a rendition of a judgment accordingly. (86:9 to 87:5)

21. Respondent refuses to address Judge Rushing's CJP censure or his involvement

A judge unconstrained by the Rule of Law, who invokes a Sheriff's power in a totally non-accountable fashion, can do even more to undermine respect for the fairness of law enforcement than the Sheriff of San Francisco who ran amuck in *Yick Wo v Hopkins* (1886) 118 U. S. 356, 366-367. In that opinion the U.S. Supreme Court, sternly rebuked the California judiciary of that day, and those who implemented state laws in its name, saying: "*We are constrained, at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question. . . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*" *Yick Wo v Hopkins* (1886) 118 U. S. 356, 373-374 continues in this vein: "*In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it*

inoperative and void. . . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Charles Jensen concedes that Defendants have accurately described how Judge Rushing's off-the-record turnover of the $10,118 in dispute came to light, but he gives no clue as to why he thinks such actions are compatible with the Due Process and Equal Protection mandates of the Fourteenth Amendment. (87:19 to 88:12)

> Plaintiff's Opposition to Defendant's November 21, 2007 Appeal is evasive:
>
> Charles Jensen proclaims "*Respondent shall not respond to Appellant's* [charges in] *#26.* [The charges in] *#26 are nothing but personal slanderous attacks on Judge Rushing.*"
>
> Appellants' November 19, 2008 Mandamus Petition to require a rehearing notes:

Appellant's #26 is the crux of the material which Charles Jensen is unwilling "to touch with a ten foot pole" and it now stands as a matter of record that he has nothing to say to rebut Appellants' charges concerning "**Judge Rushing's 'Below the Radar' Moves to Evade 11-21-07 Exemption Claim.**" The key elements here are **i)** There is nothing in what Judge Rushing places in the record to indicate that her grounds for denying the Claim of Exemption on November 20, 2007 have been completely vitiated (by timely action by James Parker to perfect an appeal, which Judge Rushing had erroneously ruled to be ineffective); **ii)** There is no proof of service of Judge Rushing's Order of September 25, 2007 in the case file, a matter of crucial importance because if either the Court or the prevailing party had served such an order, the deadline for an appeal would be 30 days or October 25, 2007 under California Rules of Court Rule 8.751(a)(1) or (2); **iii)** Because only Charles Jensen's unsigned and not endorsed filed proposed order was given to James Parker on September 25, 2007, Rule 8.751(a)(3) is controlling with its "90 days after the entry of judgment" appeal deadline (December 24, 2007); **iv)** Judge Rushing tries to get around this problem by revising the history of the case, as #26 points out: "**Judge Rushing caused this bogus entry to be placed in the 11/07/2007 electronic docket: NOTICE OF ENTRY OF JUDGMENT SERVED 9/25/07**"; **v)** Appellants eliminated any "inadvertency" defense for any member of

the Sonoma County Superior Court (against becoming an accessory after the fact to obstruction of justice, should the activity of Charles Jensen and Judge Rushing faking court documents, tampering with court files and lying about these actions be found to be a felony) by notifying the Presiding Judge of the Sonoma County Superior Court on January 28, 2008:

> Because the rationale for ruling in Charles Jensen's favor had been eliminated by a timely and totally unambiguous appeal by James Parker and Michael Halliwell from the Order of September 25, 2007, Judge Rushing eliminated ANY reference at all to the grounds for her decision from her 11/20/2007 Courtroom Minutes. Although the Minutes start with this clear statement: "ISSUE: CLAIM OF EXEMPTION" only one of the 22 lines in the minutes addresses this substantive issue, saying: "Court DENIES Claim of Exemption of Defendant James Parker." (CR-1861:6-12, CI 3146) (Id. at 26:9 to 27:10)

Defendants' January 16, 2009 Supreme Court Schedule Update notes (30:19-24):

James Parker cited Justice Brandeis' famous statement on concealment tactics:

> **"Sunlight is the best disinfectant," a well-known quote from U.S. Supreme Court Justice Louis Brandeis, refers to the benefits of openness and transparency. [It is as applicable in contemporary life as ever.] If questions from constituents, the public, or the media make leaders or other responsible parties obfuscate, the questions are usually valid and the answers are not. People who feel uncomfortable under the bright light of scrutiny and criticism often have something to hide.** (CR-666:4-7) (88:13 to 89:14)

Just as prompt restoration of a landlord's property, justifies various procedural shortcuts in Unlawful Detainer cases, so the need to protect against fire gave the Sheriff of San Francisco broad authority in *Yick Wo v Hopkins* (1886) 118 U.S. 356. However, in both cases, unrestrained discretion is antithetical to Due Process of law. (89:15 to 91:2)

22. "There was no on-bench misconduct" (CJP, 2006) is emphatically no longer true

United States v. Silverman **(1984) 745 F.2d 1386,**

1391 says of obstruction of justice: "'Endeavor,' as used in 18 U.S.C. Sec. 1503 (1976), describes any effort or assay to accomplish the evil purpose the statute was enacted to prevent. United States v. Russell (1921) 255 U.S. 138, 143. Knowledge and intent are necessary to sustain a conviction under section 1503. United States v. Haas (1978) 583 F.2d 216, 220. The government is not required to prove, however, that the defendant harbored the specific purpose of obstructing the due administration of justice; all the government has to establish is that the defendant should have reasonably foreseen that the natural and probable consequence of the success of his scheme would achieve precisely that result. [Citations.]" Some of Justice Brandeis' "sunlight is the best disinfectant" is badly needed in the present circumstances, to provide the same "strict scrutiny" which Federal law demands for suspect classifications. As the U.S. Supreme Court held in *Bolling v Sharpe* (1954) 347 U.S. 497, 499 " discrimination may be so unjustifiable as to be violative of due process."

Appellants' January 2nd First District Court of Appeal Mandamus Petition quotes their November 5, 2008 Appendix re May 6, 2008 Transcript concerning Judge Rushing's Censure by Commission on Judicial Performance. In his October 27, 2008 Opposition Brief all that Charles Jensen would say concerning Defendants' quotations from the Commission's Report and Bob Egelko's June 9, 2006 *San Francisco Chronicle*

article on this subject was: "This allegation is offensive and should be admonished." Egelko discussed Judge Rushing's censure "for driving drunk, lying about it and trying to get preferential treatment" and said of the CJP Report: "Superior Court Judge Elaine Rushing's criminal conduct was 'utterly irreconcilable with minimum standards expected of a judge,' and her attempt to use the prestige of her office for personal advantage was 'reprehensible.'"

Defendants quoted the CJP Report: "None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal 3d 826, 865, that honesty is a 'minimum qualification' expected of every judge." Beyond Respondent's saying that he was offended, Charles Jensen said nothing to dispute Defendants' parallels between Judge Rushing's behavior in the incident for which she was censured, and their own experience in her courtroom. The parallel most relevant to Charles Jensen was the observation in the CJP Report that Judge Rushing told Officer Holeman "that in her courtroom she goes against court policies for CHP and other officers, and that he should extend that courtesy to her." (Id. at 42:5 to 43:21) (See discussion in Footnote #31 of how *Haworth v Superior Court* (2008) 164 Cal. App.4th 930, 942 requires advance disclosure of a judge's having been censured by the Commission on Judicial Performance, and

> how a party is allowed to exercise his right to recuse such a judge, and to invalidate any rulings made by that judge when no disclosure of the censure has been made.) (91:12-25)

Censure for an insulting remark about a group that includes a litigant, is a valid basis for compulsory disclosure, such as to invalidate prior rulings by a judge who failed to make such disclosure (as affirmed in *Haworth v Superior Court* (2008) 164 Cal.App. 4th 930, 942 and *In re Gordon* (1996) 13 Cal 4th 472, 473). It is not clear why failure to disclose censure for dishonesty and seeking and dispensing favored treatment, should not also be a basis for invalidating everything Judge Rushing has done in *Paxinos v Halliwell & Parker*. (92:2-16)

Above and beyond her track record for dishonesty and favoritism, is the series of rulings by Judge Rushing where she acted in a manner inconsistent with Due Process of Law. If the appearance

of an inclination toward unfairness has any force at all, with respect to disqualifying a judge, it should be a compelling factor when a judge refuses to disclose the names of those who helped to save her job, when she was under fire by the Commission on Judicial Performance. (See Inquiry #177.) (92:17 to 93:9)

23. Judge Rushing's duplicity and Judicial Performance Commission censure

***Boddie v Connecticut* (1971) 401 U.S. 371, 375 notes legitimacy requires Due Process: "It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is**

also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."

Charles Jensen admits Defendants accurately related the difficulties in finding out what happened in the turnover of their $10,118 to him by the Sheriff. However, in Appeals briefing on this subject, Charles Jensen continues his stonewalling: "Defendant alleges a cover-up that never existed. No response is offered as none is warranted." Judge Rushing's evasive style in effectuating an off-the-record turnover of $10,118 of Defendants' funds to Charles Jensen, parallels the lying and favoritism for which she was censured by the Commission on Judicial Performance in 2006.

Plaintiff's Opposition to Defendant's November 21, 2007 Appeal concedes:

Appellant's 27 appears to be accurate as to how they discovered the Sheriff's collection.

Appellants' November 19, 2008 Mandamus Petition to require a rehearing notes:

Charles Jensen would have had a very steep hill to climb, were he to try to deny what he admits in #27, after having been sent (on May 12, 2008) this information, in Defendants' Memo to Sheriff Cogbill re Circumvention of Their 11-21-07 Claim of Exemption (at 27:11 to 28:6): "When Defendants contacted the

Sheriff's Department (immediately after a remark by Charles Jensen at the January 24, 2008 hearing suggested that he might already have Defendants' $10,118), it was absolutely impossible to come away with anything in writing (in spite of a protracted conversation with staff members who apparently spent HOURS talking with their superiors and Sonoma County Superior Court personnel). Whatever higher official made the decision was not disclosed by the Deputies at the window, but the position was firm: 'We don't give out information to people in your circumstances, you have to check the court file.' It was with the greatest difficulty that we were able to confirm WHEN the Sheriff's Department acted in response to direction by Judge Elaine Rushing (which Defendants needed to know in order to determine WHERE in the chronological Case File and Docket to check.) The acknowledged fact that the process of issuing a check to Charles Jensen (drawn on our funds) did not begin until November 27, 2007 indicated that whatever the court sent to the Sheriff to facilitate turning over our $10,188 to Charles Jensen was almost certainly not sent until at least five days after our November 21, 2007 Notice of Appeal (and the immediate renewal of Defendants' Claim of Exemption based on having thus eliminated the ground for its denial on November 20, 2007.) The bottleneck was broken open on May 7, 2008 when the Sheriff's Civil Bureau Manager Elizabeth J. Warren agreed to release a copy of what Judge

Rushing sent to effectuate turning over Defendants' frozen $10,118 to Charles Jensen. It turned out to be a copy of the Courtroom Minutes of 11/20/2007 **SIGNED AND CERTIFIED ON NOVEMBER 26, 2007.** (Id. at 27:11 to 28:11) (93:20 to 94:16)

The CJP summarized its findings: "None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal. 3d 826, 865, that honesty is a 'minimum qualification' expected of every judge." (CR-1867: 19-21, CI 3170) The CJP report pointed out that "Judge Rushing's conduct violated canons, 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary)." (CR-1866:15-16, CI 3169) (Id. 2:2-21) In **Section V** Respondent argues: "*Appellant's 29 is insulting and no response will be tendered.*" Respondent is offended by the possibility that Judge Rushing might have been telling the truth, and actually believed in favoritism when (according to a 2006 Report by the Commission of Judicial Performance) she made this admission: "Judge Rushing then told Officer Holeman that in her courtroom she goes against the court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate

court justice." (CR-1866:12-14, CI 3169) (94:24 to 95:7)

Over two dissents from members who did not agree to the "plea bargain" arranged with Judge Rushing (for her to accept censure in exchange for dropping any further proceedings), the Commission explains its relatively light punishment: "There was no on-bench misconduct and there was no direct adverse affect on the administration of justice per se." (CI 3153:6-7). It is obvious from Judge Rushing's evasive handling of her $10,000 fees award that she has not taken to heart the lesson she should have learned from having been caught trying to lie her way out of trouble in 2006. THERE IS NOW STRONG EVIDENCE OF ON-BENCH MISCONDUCT AND DIRECT ADVERSE IMPACT ON THE ADMINISTRATION OF JUSTICE PER SE BY JUDGE RUSHING. The question then arises as to why no response has been received by Appellants to their Notice to the Presiding Judge of the Sonoma County Superior Court, which documents this misconduct. The answer probably relates in some way to another observation made by the Commission on Judicial Performance: "Several people, primarily from the legal community have submitted letters in support of Judge Rushing remaining in judicial office." (CI 3153:7-8) If Charles Jensen has been sincere in his unstinting praise of Judge Rushing, he may well be one of the benefactors who helped to keep her on the bench. When this possibility

was raised in Item #29 of Appellants' Opening Briefs, the only response by Charles Jensen was a caption which said: "**V. APPELLANT'S 29 IS INSULTING AND NO RESPONSE WILL BE TENDERED**" A disturbing possibility exists, which was pointed out to Presiding Judge Knoel Owen in Defendants' April 1, 2008 Petition (CI 3641:14-17) that the "kid's glove" treatment Judge Rushing's flagrant abuses of Due Process is getting from the Appellate Branch, is part of an effort to protect her from further blemishes on her record (she has not faced the voters since her censure by the Commission on Judicial Performance, but is scheduled to do so in 2010). (CI 3153:20) (Id. at 48:11 to 50:2)

Boddie v Connecticut (1971) 401 U.S. 371, 374 notes the role of the rule of law:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. (95:19 to 96:13)

Harrison v NAACP (1959) 360 U.S. 167, 175 and *NAACP v Button* (1963) 371 U.S. 415, 428 mark the limits of Federal tolerance of interference with effective access to the courts, without abridging the freedoms of the First Amendment, protected against state action by the Fourteenth. *Front Royal and Warren County Industrial Park Corporation v Town of Front Royal Virginia* (1998, 4th Cir) 135 F.3d 275 affirms recourse to federal court, when federal claims ignored by state courts. (96:15 to 97:9)

24. Judge Boyd's proceedings postponement should also apply to fresh fees motions

No litigant should have to fight a two-front war, to preserve the viability of his appeal against flanking attacks from the trial court, determined to makes its challenged interpretation of the law into a *fait accompli*. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal 4th 180, 190 observes: "A trial court proceeding also affects the effectiveness of an appeal *if the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable.* .... Finally, a proceeding affects the

effectiveness of the appeal *if the very purpose of the appeal is to avoid the need for that proceeding*. In that situation, *the proceeding* itself is inherently inconsistent with a possible outcome on appeal and *must therefore be stayed under section 916, subdivision (a).*" In *Goldberg v Kelly* (1970) 397 U.S. 254, 268-269 the opinion states: "[The person facing property deprivation] is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. *These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.* Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."

The attorneys fees issue has been plagued by judicial evasiveness from the outset.

There was NO discussion of attorney's fees at the January 24, 2008 hearing, and there seemed to be an explicit agreement that this issue would be left for a later hearing. However, the Appellate Branch Order of March 6, 2008 used the completely erroneous ground that there had been no opposition to the fees motion, to affirm Judge Rushing's $10,000 default judgment. When briefing on the next appeal (which was limited to fees issue) took place, Plaintiff cited the March 6, 2008 ruling as grounds for refusing to address the merits

> of the fees award, because that was allegedly Res Judicata.
>
> It is not a coincidence that when Defendants lost their right to protect against file tampering and facilitate references, a period of "slow walk" re preparation of the court's chronological index (which serves the same function as Defendants' Case Record serial numbering) consumed three months (from February 4, 2008 until May 13, 2008). In this same time period (while Defendants were working on their Supreme Court filing due on May 5, 2008) other procedural obstacles were placed in Defendants' path. (97:23 to 98:7)

January 20, 2009 OEX proceedings before Judge Boyd focused on the acceptance by the California Supreme Court of Defendants' Appendices D and E in S169634, and the best way to keep trial court proceedings from interfering with Defendants' exercise of their appellate rights. (98:8 to 99:9) On January 20, 2009, Judge Boyd postponed further OEX proceedings:

> **So I think what we will need to do is set a date to have you come back. March 17 – I want to wait; I don't want to have to put**

it over again – 8:30 in the morning. We will have a special set. (Transcript at 17:20-24) (100:20-22)

Charles Jensen's mendacity is a continuing problem, no judge wants to address.

James Parker's November 20, 2008 oral remarks, which give the details of eight false statements in Respondent's October 27, 2008 Opposition Brief (Transcript at 13:27 to 17:3), and the lie in Charles Jensen's oral statement (the details of which are set forth in our January 2nd Mandamus Petition at 53:16 to 54:8) which Respondent's Opposition does not try to explain, except to say: "Counsel for Respondent has never been caught lying." James Parker further quoted Respondent's Opposition: "While counsel for respondent has read the appellants' Index of Plaintiff's Misrepresentations and Rules Violations, there was nothing in it worthy of response." James Parker then asked: "Does Charles Jensen wish at this time to explain any of his latest alleged misrepresentations, or cite anything incorrect in our previous charges of professional misconduct?" When Charles Jensen said nothing, James Parker said to the Court: "Your Honor, I just want it to be said that there was no response." Judge Chouteau responded: "I am indicating there should not be a response." (Transcript at 17:7-23) (99:12-19)

Clark v Millsap (1926) 197 Cal 765, 785 and its progeny (*Denton v Smith* (1951) 101 Cal.App.2d 841, 845; *Grove v State Bar* (1965) 63 Cal 2d 312, 315; *Clancy v State Bar* (1969) 71 Cal 2d 140, 148; *Goldstein v Lees* (1975) 46 Cal.App.3d 614, 618; *Di Sabatino v State Bar* (1980) 27 Cal 3d 159, 162-163; *Crayton v Superior Court* (1985) 165 Cal.App.3d 443, 447) affirm an attorney's obligation under Business & Professions Code Sec 6068(d) not to conceal facts and make misleading statements. (99:21 to 100:13)

25. Self represented litigants deserve fully unobstructed statutory preparation time

When favoritism rises to the level of faking court records, it becomes obstruction of justice. *United States v Buffalano* (1984) 727 F.2d 50, 54 says re the scope of protections against this in 18 U.S.C. § 1503: "In United States v. Russell (1921) 255 U.S. 138, 143, the Supreme Court defined 'endeavor,' while discussing the statute's predecessor, as '*any effort or essay to accomplish the evil purpose that the section was enacted to prevent.*' By using such term Congress purged from the statute the technicalities associated with

distinguishing between preparation for an attempt and the attempt itself."

> The deliberate "jamming" of Defendants by the manipulation of various briefing schedules to create at "two front" squeeze, was as clear a sign of bias, and as clear a basis for vacating the judgment resulting from a denial of adequate preparation time, as in *Gamet v Blanchard, supra.* Plaintiff's counsel does not deny that this "two front" situation was deliberately created, only claiming "we're under no obligation to time our motions to go along with whatever they have going on." Attorneys' other court commitments certainly ARE considered for purposes of hearing scheduling, why not the conflicting scheduling demands IN THE SAME CASE, for self-represented litigants?
>
> The timing and scope of the $20,720 fees hearing on May, 6, 2008, was a deliberate effort to interfere with and punish Defendants' efforts to appeal a prior attorney's fees award. Such reprisals are contrary to federal policy, for reasons which are fully applicable to State legal proceedings. Thus, *Webster v Sowders* (1988) 846 F.2d 1032, 1040 observes:
>
> > Just as it appears clear that a trial judge cannot sanction a party or lawyer for taking an appeal, we do not believe that it is proper here for the District Judge to threaten to sanction the defendants or their attorney for filing a mo-

> tion to stay his order pending appeal on the grounds that the underlying appeal is frivolous. The only purpose of such a threat is to prevent an appeal. Appeals of district court orders should not be deterred by threats from district judges.

Parker's May 5th Affidavit re Tentative Ruling of May 5, 2008 (2:21-25) notes:

> Charles Jensen's demand for $20,000 in fees for having to read the "irreverent dribble" produced by Defendants, because "even a blind pig can find a truffle every now and then" was timed for maximum disruption of Defendants' appeals to the First Circuit Court of Appeal and the California Supreme Court. (101:5-21)

At the May 6, 2008 hearing James Parker protested to Judge Rushing: "But the point here is he's never – he's never controverted with law any of the citations that we have – that we've briefed him on. All he said is they're dribble [Jensen's exact word], nonsense and whimsy; so I would like to ask the Court to ask him what percentage of those citations that were issued – what fraction are whimsy, dribble and nonsense?" Judge Rushing replied: "Okay, Mr. Parker, I'm not going to ask that question." James Parker continued: "One last thing, then. Okay. I would like to ask one more question. Can he now cite any one citation that's whimsy,

> dribble and nonsense?" Judge Rushing replied: "I'm not going to force him to do that." James Parker then complained: "Defendants take exception to that because all he's – essentially all his argument is it's all garbage. He's never controverted a single one of our citations, and they are scholarly, and they're well documented." (Transcript at 17:9-24) (102:3-9)

The "second front" time pressure on Defendants from OEX proceedings was aggravated by a "slow walk" with respect to transcript availability, which made it very difficult for Defendants to document their claims, at a time when the Appellate Branch was willing to consider them. (102:10-21)

> At the January 20, 2009 OEX Hearing James Parker said of prior proceedings:
>
> > This is the sixth time we have been here, and I am sure Mr. Jensen doesn't want to be here another six times – and I am not saying that will happen, but it just seems to us that this is the most efficient way to do this, so you can decide, this Court can decide also if Mr. Jensen's argument is meritorious and why he has jurisdiction. (Transcript at 6:18-23)

At the January 20, 2009 OEX Hearing, Plaintiff's counsel Charles Jensen said:

> The Court has the matter in front of it. The Court has stayed that matter until we get a decision from the Supreme Court. (Transcript at 7:18-20)

At the January 20, 2009 OEX Hearing, Plaintiff's counsel Charles Jensen said:

> The $10,000 has been paid, Your Honor. We are here on the second motion for attorneys' fees, which I am referring to as the $20,000 decision from Judge Rushing. That is the basis of the OEX. We have jurisdiction of the parties. The Court has found the preliminary finding that there may be contempt in front of the Court, but you have withheld that as a final order pending the decision of the California Supreme Court in the case [S169634] using the last three digits of 634. (Transcript at 15:10-18)

At the January 20, 2009 OEX Hearing Judge Boyd made this key ruling:

So now that I am beginning to get a clearer picture of the whole story, not just this Court's role, which was the enforcement of the judgment, I believe that the Court was premature in the finding of contempt. At this time I am going to vacate the finding of contempt,

as that matter of enforcement of the $20,000 is on appeal. (Transcript at 18:2-8)

The benefits for Defendants of this ruling should not be dissipated by launching Plaintiff's $19,522 fees motion to take up, where the $20,720 OEX proceedings he initiated left off. (102:22 to 103:14)

26. The timing of Plaintiff's fees motions and their consideration was grossly unfair

***Nebbia v New York* (1934) 291 U.S. 502, 525 discusses Federal Due Process standards: "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained." This standard is not satisfied by a process requiring the same statutory preparation time to be divided between overlapping briefing and hearing schedules contrived by the opposition.**

In his October 27, 2008 Reply Brief (LNT at 9:18-19) Charles Jensen asserts: "There has been no intent on the part of counsel to rob these litigants of due process." This is a reference to James Parker's protest at the May 6, 2008 hearing that Charles Jensen "brought a two-pronged attack against us" in deliberately timing his $20,720 fees motion so that it would reach a critical juncture when defendants faced crucial filing deadlines with

respect to Judge Rushing's earlier award of $10,000 in attorney's fees (Transcript at 6:8-10). Plaintiff's co-counsel Kadin Blonski responded "we're under no obligation to time our motions to go along with whatever they have going on." (Transcript at 9:18-20) Mr. Blonski also added this false statement in support of his two-pronged tactic: "There's been no motion at all for a continuance other than what was just made orally." (Transcript at 9:14-15) Charles Jensen knew this to be false because he received a copy of Defendants' April 30, 2008 Petition to Postpone May 6, 2008 Hearing on Attorneys Fees (CI 3710-3714). (See Item #8 of Transcript Analysis.) (103:22 to 104:4)

Our October 14, 2008 Petition for Proper Briefing Prior to Appeal Rulings says:

Since litigants in *pro per* must learn the law as they go along, it is very difficult for them to "keep their heads above water" when they are forced to fight a two (or three) front war. The scheduling of a $20,000-plus attorney's motion so that its briefing and hearing (March 25, 2008 to May 6, 2008) overlapped the filing deadlines for higher court review of their July 24, 2007 appeal of pre-trial and trial issues and briefing on Judge Rushing's off-the record transfer of $10,118 of Defendants' funds to Charles Jensen. This confluence of deadlines did not have to occur. **a)** It took until November 5, 2007 for a briefing order to be issued for Defendants' July 24, 2007 appeal.[1] **b)** The

listing in the Chronological Index for the 1/14/2008 briefing order which originally set a June 26, 2008 hearing date for Defendants' November 21, 2007 Appeal has the correct date, but it also lists this order as "Notice of Time and Place for Filing Griefs."

This briefing was aborted on account of a dispute over a missing Chronological Index, noted in Judge Chouteau's order of February 5, 2008 (CI 03412). It took until May 13, 2008 to get the Chronological Index updated and briefing reinstated. (For some reason this briefing order is not included in a later edition of the Chronological Index up through 8/29/08.) **c)** Judge Chouteau took no action for more than two months on Defendants' February 4, 2007 "Petition to Presiding Judge Knoel Owen re No-Notice Change in Policy Allowing Copies of Filings of in Record Designations" (CI 03198), which had been referred to him. (The Court Clerks would not say who they meant by "the judges don't like it" with respect to disallowing the use of CR numbering by Defendants, but Supervising Judge of the Civil Division Elaine Rushing bears responsibility for this decision, and her file manipulation was the reason why Defendants felt obliged to institute their CR numbering.) On April 18, 2008 Judge Chouteau signed an order saying: "Appellants Petition re Notice Change is denied." (CI 03991) However, this order was not filed and served on the parties until May 23, 2008. **d)** On April 30, 2008, in full compliance with

> everything the window clerks asked of them, Defendants filed their "Petition to Presiding Judge Knoel Owen to Postpone May 6, 2008 Hearing on Attorneys Fees." The window clerks informed Defendants to check Box 73 in the Hall of Justice for a response. They checked Box 73 repeatedly up until the May 6, 2008 hearing was upon them, but no action was apparently taken on this motion. (Id. at 62:2 to 63:5) (104:5-23)

A key aspect of the "two front" situation which plagued Defendants' prosecution of their appeals is manifest in a series of orders, which involved long delays in reaching a decision, and further delays until they were filed on May 23, 2008. These problems were aggravated by Judge Chouteau's "pulling the plug" on a briefing schedule issued on January 14, 2008, which was not reinstated until May 13, 2008. The most sensitive of the motions thus disposed of was never answered, until Judge Chouteau could declare it "denied by operation of law on April 5, 2008, pursuant to CRC 8.708."

(104:24 to 105:13) When Defendants finally had an opportunity for briefing relating to the various procedural maneuvers by the Appellate Branch (in grievance #20 in Michael Halliwell's June 2, 2008 appeal brief), Charles Jensen simply refused to respond to any part of these concerns (in appellant's #20). (105:14 to 106:12)

27. Without actual adjudication, there is no such thing as *res judicata*

Written orders which evade sensitive issues central to a defendants case deserve no deference, especially when they are filed too late to be subject to clarification via a motion for rehearing. *Goldberg v Kelly* (1970) 397 U.S. 254, 271 affirms: "And, of course, an impartial decision maker is essential. (In re Murchison (1955) 349 U.S. 133, 136 ['A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.'])

> Defendants' January 16, 2009 Supreme Court Schedule Update notes (6:15-25):

Except for two opening sentences invoking the fact that the Appellate Branch had indeed ruled in Respondent's favor, here (in his March 26, 2008 Opposition to Defendants' Motion to Reconsider the Order of March 6, 2008) is the entirety of the ONLY response to ANY of Defendants' motions for reconsideration or rehearing (or petitions to higher courts) that Charles Jensen has ever made:

> *The purported 'Request for Reconsideration; herein is cobbled together with excerpts from the internet (irrelevant), misquoted legalisms (irreverent), and the Defendants' own conclusion as to it's impact (meaningless). Between the trial of June 2007, and the appellate arguments of January 2008, these Defendants filed and served, more than 2900 pages of whimsy, dribble and nonsense. Nowhere were there, or are there, cohesive legal thinking and conclusions based on law and the facts of this case. This, as all other "pleadings," are without merit, and it is respectfully requested that this "motion" be denied.*

Defendants' January 16, 2009 Supreme Court Schedule Update notes (at 23:3-6):

Appellants' March 20, 2008 petition for reconsideration of the Order of March 6, 2008 sought to clarify facts and issues involved in the handling of this case by the Appellate Branch, in accordance with the policy set forth

in CRC Rule 8.500(c) (that a reviewing court will accept a lower court's statement of the issues and facts unless an appellant has called the lower court's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing).

Defendant Halliwell's Reply Brief re May 27, 2008 Appeal (9:22 to 10:5) says:

There is not a single instance in any transcript, Courtroom Minutes, or ruling by Judge Rushing which in any way addresses Defendants' documented complaints about the evasive and sometimes illegal tactics used by Charles Jensen. Nor does Charles Jensen cite a single instance in his own brief of any allegedly false charge made by Defendants. Charles Jensen's only reply to the misconduct charges he wants to be paid for reading, is that it does indeed take many pages to establish the context, set forth Respondent's various sneaky maneuvers and cite caselaw which precludes this sort of behavior.

Defendant's July 14, 2008 Defense of Their Right to Manage Their Case states:

There are no magic talismans in the American system of justice, whereby a judge can proclaim "You lack standing" or "I find you in contempt of court" and thereby sweep away all of a litigant's procedural rights. Moreover, the judges at the very top of our State and National judiciary are mostly very careful to justify

practically everything they do in terms of established precedents, and only rarely use their authority to modify existing law. It goes without saying that judges at the intermediate and lower levels of the judiciary have no authority at all except to apply the law in an even-handed manner, to all who come before them. Where one side provides a plethora of governing precedents to justify their position, and the other side provides nothing (and employs a logic which interfaces not at all with principles they must have learned in order to pass the bar examination) one can be certain that the side with nothing stronger than "because I say so" is wrong. (Id. at 1:11-21) (106:21 to107:22)

In his October 27, 2008 Opposition Brief, all that Charles Jensen would say concerning Defendants' quotations from the Commission's Report and Bob Egelko's June 9, 2006 *San Francisco Chronicle* article on this subject was: "This allegation is offensive and should be admonished." Respondent is offended by the possibility that Judge Rushing might have been telling the truth, and actually believed in favoritism when (according to a 2006 Report by the Commission of Judicial Performance) she made this admission: "Judge Rushing then told Officer Holeman that in her courtroom she goes against the court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband

was an appellate court justice." (CR-1866:12-14, CI 3169) **Charles Jensen has refused to say whether he was one of Judge Rushing's supporters in her hour of need, when members of the Sonoma County legal community wrote the Commission on Judicial Performance, urging that Judge Rushing be allowed to remain on the bench. Charles Jensen responded to our inquiry about this, in our July 3, 2008, briefing by stating: "Appellant's 29 is insulting and no response will be tendered."** (107:24 to 108:7)

There has been substantial progress on the key OEX front of the "two front squeeze" facing Appellants. Defendants asked that OEX proceedings not be resumed until five days after the Supreme Court rendered a decision on whether to grant review in S169634. In setting the date for a new hearing six days after the best estimate (March 11, 2009) of State Supreme Court clerks re how long it might take to reach a decision on the status of S169634, Judge Boyd granted Defendants' request (for time to consider the possibility of federal

appeals). Moreover, Charles Jensen tried to intrude on the time set aside for the consideration of Defendants pending appeal, by requiring Defendant James Parker to supply answers to financial questions in advance of the March 17, 2007 slated date for examination of the status of the OEX aspects of the case. However, Judge Boyd deferred consideration of Charles Jensen's request until the parties were before the court on March 17th. (108:8-23)

Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal 4th 180, 200 observes:

> Plaintiffs contend the Court of Appeal's summary denial of defendants' earlier petition for writ of supersedeas seeking a stay pending appeal is law of the case and requires affirmance. Recognizing that we previously held that "a summary denial of a writ petition" should "not be given law of the case effect" (*Kowis v. Howard* (1992) 3 Cal 4th 888, 897), plaintiffs propose an exception to this rule in cases where, as here, the defendant argued that the court had no discretion to deny relief. We have, however, rejected such an exception in

> the past because it would hamper judicial economy (*id.* at p. 898), and see no reason to reconsider it here. (2/3/09 Petition at 93:9-13) (108:24 to 109:4)

People v. Malveaux (1996) 50 Cal.App.4th 1425, 1434 and *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944) 322 U.S. 238, 246, 248 affirm the power of courts to investigate fraud whenever it is discovered, regardless of any deadlines for consideration which may have lapsed in the meantime. In *Hazel-Atlas*, *supra*, Justice Roberts observes:

> No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. (322 U.S. at 251) (109:5-17)

28. Severe deprivation of Due Process warrants a writ pursuant to CCP Sec 1086

Defendants are entitled to the Due Process protections affirmed in *Greene v McElroy* (1959) 360 U.S. 474, 496-497: "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where

governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

California Rules of Court 8.1005 and 8.1008 work "to secure uniformity of decision or to settle an important question of law" only when trial courts set forth the grounds for their decisions, and Appellate Branch opinions explain why a challenged Local Rule is in conformity with governing precedents. In *Elkins v Superior Court of Contra Costa* (2007) 41 Cal 4th 1337, all seven justices of the California Supreme Court overturned the Local Rule, even though the District Court of Appeal summarily rejected the case at their level. This case is similar to *Elkins*, in that

the Sonoma County Superior Court policies for Unlawful Detainer trial-date setting and subsequent case management undermine state policy and fundamental concepts of Due Process of Law. (110:4-8)

Defendants' January 16, 2009 Supreme Court Schedule Update notes (1:15-21):

Plaintiff's counsel has opened a FOURTH front in this case (see accompanying copy of his $19,522 fees motion, set for hearing before Judge Rushing on February 10, 2009), based on his continuing disregard for the importance of the upper rungs in the appeal process. This motion (at 3:7-8) proclaims "little doubt as to the outcome of [Defendants' Petition for Review] which is pending in the California Supreme Court." This Memorandum analyzes this latest "squeeze play" and shows that not a single aspect of it is justifiable in terms of the work for which compensation is claimed. We therefore urge that OEX proceedings be permanently suspended until ALL of the outstanding fees-and-costs-only appeals in this case have been fully resolved.

As with Plaintiff's previous effort to invoke Res Judicata in OEX proceedings, this latest fees motion is designed to preclude the self-represented Defendants in this case from taking full advantage of the limited preparation time available to appellants under California Rules of Court (for appeals relating to aspects of this case that are clearly founda-

tional to this new $19,522 fees request.) (110:14-23)

Charles Jensen is continuing his tactic of piling fees upon fees, which started at a time when he demanded an unreviewable payment of $4,000, at a time when he was entitled to only $375 pursuant to Local Rule 2.2E. Indeed, when Defendants refused to capitulate on paying the $20,720 "reading fees" award until this judgment was fully adjudicated, Charles Jensen raised his demand from $7,800 in additional fees, to $19,000. (110:14-23)

> In *Gromeeko v Superior Court* (1952) 114 Cal.App.2d 754, 757 the opinion notes:
>
> Since the interpretation put on the stay order by the trial judge seems clearly erroneous and would constitute in our view a clear abuse of discretion we may treat the petition for prohibition as one for mandamus and correct the court's threatened action by the latter writ. (Simmons v. Superior Court (1950) 96 Cal. App.2d 119, 132.)
>
> *Louie Queriolo Trucking v Superior Court* (1967) 252 Cal.App.2d 194, 197 held:

If this was, as we believe, an abuse of discretion, in the circumstances, a writ of mandate should issue inasmuch as there is otherwise no adequate remedy. Section 1086 of the Code of Civil Procedure provides for a writ of mandate "in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."

Babb v Superior Court of Sonoma County (1971) 3 Cal 3d 841, 851 provides for the issuance of a writ of mandate where "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (CCP Sec 1086). . . . .

The *Babb* opinion emphasizes the Court's reluctance "to employ prerogative writs" for ongoing proceedings, saying: "Indeed, we perform such a function of intermediate review with extreme reluctance." However, *Babb* continues: "However, upon occasion our attention is drawn to instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ. (See *Holz v Superior Court* (1970) 3 Cal 3d 296, 301, fn 4.)" In *Holz, supra*, the High Court ruled: "Where it appears that the trial court has made a ruling which deprives a party of the opportunity to plead his cause of action or defense, relief by mandamus may be appropriate." (111:8-22)

Superior Court of California, County of Sonoma
600 Administration Drive, Room 107-J
Santa Rosa, CA 95403-2878
(707) 521-6500, www.SonomaSuperiorCourt.com

FILED
MAR 11 2009

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

Case No. MCV-191306

CHRYSTANTHE E. PAXINOS

Plaintiff/Respondent

vs.

MICHAEL HALLIWELL, et al,

Defendant/Appellant

_____/

Notification of the Filing of the Notice of Appeal [CRC Rule 8.750(b)]

TO THE RESPONDENT(S) ABOVE NAMED:

YOU AND EACH OF YOU will please take notice that appellants Michael Halliwell and James Parker filed a Notice of Appeal in the above-entitled action on 3/10/09, at the Superior Court of California, County of Sonoma, and hereby appeals to the Appellate Division, Superior Court of California, County of Sonoma.

Date: March 11, 2009

DENISE GORDON
COURT EXECUTIVE OFFICER

by_____
Karina P. Royer
Senior Legal Processor

SUPREME COURT
FILED
MAR 24 2009
Frederick K. Ohlrich, Clerk

S170538

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MICHAEL HALLWELL, et al., Petitioners,

v.

SUPERIOR COURT OF SONOMA COUNTY,

Respondent;

CHRYSANTHE PAXINOS, Real Party in Interest

The abover entitled matter is transferred to the Court of Appeal, First Appellate District, for consideration in light of *Hagan v Superior Court* (1962) 57 Cal. 2d 767. In the event the Court of Appeal determines that this petition is substantially identical to a prior petition, the repetitious petition must be denied.

GEORGE, C.J.

Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED

MAR 26 2009

MICHAEL HALLIWELL, et al.	)	
Petitioner,	)	A124403
v.	)	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA,	)	
Respondent;	)	
CHRYSTANTHE PAXINOS,	)	
Real Party in Interest.	)	

Sonoma County
Superior Court
No. MCV-191306

BY THE COURT:

The petition for writ of mandate is denied.

Dated: Mar 26 2009

KLINE, P.J.

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

Court of Appeal
First District
FILED
MAR 30 2009

COURT of APPEAL FIRST APPELLATE DISTRICT
Division Two **Case # A124403**

Michael Halliwell, et al,
Petitioners vs.

Superior Court of California, County of Sonoma, Respondent;

Chrysanthe Paxinos, Real Party in Interest

Sonoma County
Case # MCV 191306

Appellants' **S170538** Update re March 24, 2009 Transfer of February 17, 2009 Mandamus Petition for Consideration in Light of *Hagans v Superior Court* (1962) 57 Cal 2d 767

There are no "loose ends" from the recent dispute over interpreting CRC 8.512(c)(2), which might complicate consideration of the transfer of S170538 to the Court of Appeal; (see Postscript). S170538 was filed BEFORE the Supreme Court's February 18, 2009 Order declining to review S169634/A123622, and tangential connections to this prior petition (and even more tenuous connects to prior petitions S168827/A123266 or S163276/A121269) are dealt with as the final item of this UPDATE.

A threshold *Hagan* consideration is clearly applicable here: "In the absence of unusual or changed circumstances, courts should not permit

reconsideration of determinations long since final." (57 Cal 2d at 769) What Defendants allege is a severe judicial abuse of discretion is **certainly unusual and unarguably rapidly changing** (even since Defendants most recent submissions to the California Supreme Court in S170538). Section I includes key events in this case immediately before and just after the Supreme Court's March 24, 2009 Transfer Order. Section II deals with the Second Front Tactics which were aggravated by the opening of a Fourth Front (a $19,000 fees award on February 10, 2009) and a Fifth Front (Judge Rushing's February 9, 2009 "vexatious litigant" initiative), both of which DO relate to the subject matter of prior petitions, but only in the sense that all the attorney's fees in the case harken back to prior proceedings, and Judge Rushing seeks to label Defendants' prior activities as "frivolous."

Dated this 27th day of March, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

I. Recent Multi-Front Attacks [Since 2/17/09]

If Real Party's attorney Charles Jensen and OEX Judge Robert S. Boyd were correct in the alleged limitations on federal appeals set forth in the following excerpts relating to the March 17, 2009 OEX hearing, nothing could be done to seek federal review of Due Process of Law violations. And federal appeals could be rendered nugatory by pre-emptive enforcement action in state court. The preparation period prior to the filing of a federal appeal, simply must be given protection, if litigants *in propria persona* are to have any federally enforceable rights.

Appellants' March 19, 2009 S170538 Update re Third Front Situation states (at 2):

> **We DO NOT believe that Judge Boyd has a dismissive attitude toward the Federal Due Process and Equal Protection guarantees set forth in the Bill of Rights and the Fourteenth Amendment.** However, Judge Boyd treated Defendants' attempts to seek enforcement of these rights *vis a vis* the $20,720 fees judgment, as being of little consequence (perhaps he misconstrued our effort, as intending to start an inevitably time consuming action in Federal District Court, when in fact, we plan a direct appeal to the U.S. Supreme Court pursuant to 28 U. S. C. Sec 1257, which has a 90 day filing deadline after denial of discretionary

review by a State's highest court).

At the March 17, 2009 OEX Hearing Real Party's counsel Charles Jensen argued:

Removal to the federal court requires that it be done in the beginning so that you preserve your right. The beginning of this case is now roughly a year and a half old. (Transcript at 4:21-25)

Judge Boyd somehow decided that enforcement action can properly pre-empt an appeal:

The intention to file an appeal has no bearing upon this Court's ability or the appropriateness of this Court, of course, having to go ahead and provide the judgment. (Transcript at 5:28 to 6:3)

Appellants' March 19, 2009 S170538 Update re Third Front Situation states (at 3):

We believe the ultimate jurisdiction of this Court to grant a stay to allow us to be free of interference (until our Petition for Certiorari is due in the U.S. Supreme Court), is supported by *Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851 (Footnote 20.159 at 122 of Appendix H).

How Defendant James Parker tried unsuccessfully to avoid the adverse impact on his ability to defend his rights in other ongoing proceedings (and to preserve an effective right to appeal where "the clock was running") is described in his March 20, 2009 Memorandum that is attached as Item IV of Appendix I. Transcript Analysis which documents

how Judge Boyd imposed his Contempt of Court jail sentence is provided in Item II. The OEX Hearing Transcript itself is Item VI. James Parker's unsuccessful effort to mitigate Judge Boyd's jail sentence by means of his habeas corpus petitions is described in Item I of this Appendix. How Judge Rushing operated in tandem with Judge Boyd, to complete the process of sidetracking Defendants' Motion to Stay imposition of another ($19,000) fees award, while Defendant was "tied up" with ongoing appeals, is described in Item III. The role of Judge Rushing's issuance of a Tentative Ruling (in violation of Local Rule 2.2D), in crushing the last vestige of Due Process out of her $19,000 fees award is set forth in the Affidavits in Item V.

There is a clear reference in the Supreme Court's transfer order to this key *Hagan* consideration: "By this repetitive process petitioner is attempting to secure an unwarranted extension of the time in which to petition this court for a hearing." (57 Cal 2d at 770) **Extra** time, was never the purpose of Appellants' Mandamus Petition, simply the effective use of the time available under an orderly application of California Rules of Court, with at least minimal

consideration of what is happening in the proceedings below. Prior petitions for mandamus to the Court of Appeal mainly sought a remand for purposes of clarification. For reasons of the deliberate obstructionism by some judges of the Sonoma County Superior Court (which is documented and analyzed in the accompanying Appendix), a remand to the same judges is unlikely to improve the situation. According to this *Hagan* factor, the Court of Appeal still has jurisdiction to deal with the underlying merits: "For this reason [the lack of an opinion in the first denial], the second application to the District Court of Appeal was not barred by the doctrine of res judicata, so far as the merits are concerned." (57 Cal 2d at 770)

II. Appellants' Original Mandamus Issues

Another *Hagans* factor relates to similar, but not substantially identical, issues:

> Of course, the first denial did not deprive the appellate court of jurisdiction to consider the second application nor was it res judicata of the merits of the controversy there involved. The rule is well settled that a denial by this or the appellate court of an application for a writ without opinion "is not res judicata of the legal issues presented by the application unless the sole possible ground of the denial was that the

court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits." [Citations.] (57 Cal 2d at 770)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites a key precedent:

Romer v Evans (1996) 517 U.S. 620, 633 affirms that equality requires impartiality: "*Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.*" (Id. at 10)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites a vital concept:

In *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1364-1365, the California Supreme Court rejected elevating speed of adjudication over substantial justice, and cited *Hernandez v Superior Court* (2004) 115 Cal.App.4th 1242, 1246, which affirms that "the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency." (Id. at 13)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites recent events:

Defendants' February 2, 2009 Petition sought a preliminary ruling from Sonoma County Superior Court Presiding Judge Knoel Owen on whether Appellate Branch Presiding Judge Rene Auguste Chouteau should play a role in deciding on the Petition for a Writ of Supersedeas, which Defendants intended to submit. The February 2nd Petition raised the issue of what Defendants feel

has been Judge Chouteau's obstructionism in appeal scheduling matters (such as his pulling the plug on scheduled appeal briefing on February 5, 2008 and not reinstating briefing until May 13, 2008). On February 3, 2009, Defendants filed their Supersedeas Petition, which sought cancellation of a February 10, 2009 Fees hearing (on the ground that its briefing schedule overlapped a period of time when Defendants were fully occupied with Appeal and OEX matters). Both Petitions thoroughly reviewed Defendants' California Supreme Court filings to demonstrate the strong Federal component of most of Defendants' grievances. (Thus, however pending decisions by the California Supreme Court on whether to grant review are resolved, Defendants face a very substantial preparation and drafting task in seeking to protect their federal rights, in whatever forum remains open). No action was taken on the February 2nd or February 3rd Petitions. Defendants attempted to file their February 9, 2009 Motion for a Stay of Trial Court Proceedings (which added numerous citations of federal caselaw in support of their various grievances, and reasserted Defendants' right to cancellation of the February 10, 2009 fees hearing, which sought to impose a severe ($19,000) penalty on Defendants for devoting their attention to protection of their Federal rights). Apparently, Judge Rushing has asserted the notion that (in the sensitive situation created by her prior conduct in the case) she should be the sole arbiter of when to schedule further fees motions. The filing clerks in Room 107J departed from their established practice of accepting extraordinary

petitions for consideration by whatever judge(s) were later determined to be appropriate. In this instance they insisted on deferring to Judge Rushing on the disposition of Defendants' February 9th motion. Judge Rushing decided that the February 9th motion to cancel the February 10, 2009 Fees hearing, be placed on her March 24, 2009 Law & Motion calendar, thereby completely defeating the purpose of the motion. (Id. at 28-29)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites further abuses:

Interspersed with Judge Rushing's repeated interruptions, as Defendants tried to read their jurisdictional motion, was a discussion of Defendants' "second line of defense" (an equitable argument that we deserved a postponement because so much of the briefing period for the $19,000 fees motion was improperly taken up by OEX proceedings). This was based on Judge Robert S. Boyd's January 20, 2009 ruling wiping out the effects of OEX proceedings, which Judge Boyd determined to have been conducted prematurely:

"So now that I am beginning to get a clearer picture of the whole story, not just this Court's role, which was the enforcement of the judgment, I believe that the Court was premature in the finding of contempt. At this time, I am going to vacate the finding of contempt, as that matter of enforcement on the $20,000 is on appeal."

Since Judge Rushing felt that Judge Boyd's Order of January 20, 2009 was a mistake, she brushed aside this equitable argument. When she rejected Defendants' jurisdictional challenge, Judge

Rushing did so without explanation. Without skipping a beat, Judge Rushing went from her ruling that she did in fact have jurisdiction, to affirm her unexplained Tentative Ruling to grant Plaintiff's motion for attorney's fees in the amount of $19,000. There is no way that such a process of consideration can be considered a "meaningful hearing at a meaningful time" within the meaning of *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552. (Id. at 30-31)

Appellants' February 17, 2009 Petition re Corrective Mandamus invokes appeal rights:

At the February 10, 2009 Fees Hearing, Judge Rushing expressed the view that Judge Boyd was wrong to have suspended OEX proceedings, and that the discretionary review part of the appeals process involved no rights for an Appellant. Therefore, her trial court need not make any accommodation to protect an Appellants' optional rights. The February 10, 2009 Fees Hearing started off with a protracted battle occasioned by Judge Rushing's insistence that even a motion (attached) premised on a court's alleged lack of jurisdiction had to be placed on the Law & Motion Calendar in the usual fashion, in order to receive consideration. In fact, a court should NEVER act without jurisdiction, and such a challenge is always timely (when it is supported by the facts of the case). Defendants' "Motion re Lack of Jurisdiction" was based on their December 22, 2008 Notice of Appeal (wherein all transcripts have been prepared and paid for, but a briefing schedule has not yet been set). The focus

of this appeal is Judge Rushing's insistence on ignoring the mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423, which affirms: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.*" There was no indication that Judge Rushing would be willing to conduct the February 10, 2009 fees hearing, in accordance with *Gray v Justice's Court*, and she was in fact unwilling to do so. Accordingly, the hearing was an aspect of the case related to a pending appeal, and Judge Rushing had no authority to act at all in this matter. Thus *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 190 notes: "if the possible outcomes on appeal and the actual or possible results of the proceeding are irreconcilable . . . *that proceeding must be stayed under section 916, subdivision (a).*" (Id. at 29-30)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites a recent grievance:

Judge Rushing's invocation of California's "vexatious litigant" statute (CCP Sec 391) seeks to brand as frivolous, several of the 28 specific grievances whose supporting evidence and caselaw is set forth in the Appendix to this Petition. During proceedings where Judge Rushing issued the rulings that she claims are being frivolously challenged, she never cited any supporting authority, and rarely gave any explanation of her rulings. The main basis for Judge Rushing's February 9, 2009 Order to Show Cause, is set forth therein at 3:23-28:

> Specifically, the filing of numerous Appellate

and Supreme Court actions constitutes repeated "attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." CCP Sec 391(b)(2).

This was written before Judge Rushing took the bench for her Fees Hearing at 8:30 AM on February 10, 2009, and it clearly reflects her view that a ruling by the Appellate Branch of a Superior Court is a final determination of a limited jurisdiction (less than $25,000 maximum award) case. In Judge Rushing's view, any attempt to seek review by a court that is not obliged to take the case is, *ipso facto*, frivolous. This concept implies that the Plaintiff in *Elkins v Superior Court of Contra Costa County* (2007) 41 Cal 4th 1337, should have given up after the Court of Appeal summarily denied his challenge to procedures that were strongly (and apparently unanimously) supported by the Contra Costa Superior Court. Such a broad definition of "frivolous" is untenable, and Judge Rushing's Order to Show Cause should be permanently stayed, without prejudice to its renewal, if and when the Sonoma County Superior Court rulings being challenged by Defendants have been shown to be consistent with governing precedents and consistent with proven facts in the case.

If a permanent stay without prejudice to renewal in appropriate circumstances is not considered a proper response to the intrusion upon Defendants' preparation and drafting time re their ongoing appeals, Defendants alternatively seek a delay in the slated April 14, 2009 hearing on Judge Rushing's Order to Show Cause. This period wherein the holding of such a hearing is barred should extend until the time for filing a petition for review of the federal aspects of Defendants' allegedly frivolous claims has expired (thus providing an opportunity to seek a further stay in Federal Court). (Id. at 31-32)

Appellants' February 17, 2009 Petition re Corrective Mandamus cites Appendix contents:

To provide a convenient "check list" for Defendants' Federal grievances, to facilitate a determination of which (if any) of them may be frivolous, they are listed with supporting authorities:

Summary of Defendants' Main Claims Set Forth in Accompanying Appendix F
(For details relating to any of these claims, see same # in Appendix.)

#1. Automatically giving the landlord the first available Unlawful Detainer trial date, sacrifices proper determination of the facts to speed of adjudication in violation of *Green v Superior Court* (1974) 10 Cal. 3d 616, 636; *Universal Oil Products Co. v Root Refining Co.* (1946) 328 U.S. 575, 580 and *Brinkerhoff-Faris Trust & Savings Co. v Hill* (1930) 281 U.S. 673, 682.

#2. Perjury can never be a valid means of depriving tenants facing eviction of 10 days of preparation and discovery time, which they are entitled to under circumstances of actual service. (*Kulko v California Superior Court* (1978) 436 U.S. 84, 101; *NAACP v Button* (1963) 371 U.S. 415, 428; *Hazel-Atlas Glass Co. v Hartford-Empire Co.* (1944) 322 U.S. 238, 245)

#3. A good faith attempt to challenge the proper invocation of a court's jurisdiction is not converted from a special appearance into a general appearance simply because the court refuses to take cognizance of the challenge. (*The 1880 Corporation v Superior Court* (1962) 57 Cal.2d 840, 843; *Pease v City of San Diego* (1949) 93 Cal 2d 706, 711-712; *Parsons v Superior Court of Marin County* (2007) 149 Cal.App.4th Supp. 1, 6)

#4. A pre-emptive strike against discovery by severing communications (in violation of CCP Sec 2016.040 and Local Rule 5.7D) cannot be the basis for denying discovery to a party who is in compliance with statutory and local rules. (*Townsend v Superior Court* (1998) 61 Cal.App.4th 1431, 1435; *Obregon v Superior Court* (1998) 67 Cal. App.4th 424, 434; *Schweiger v Superior Court* (1970) 3 Cal 3d 507, 514)

#5. Defendants' right to re-open discovery after Plaintiff's frivolous challenge to a jury trial forces postponement of original trial date (*Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 376; *Beverly Hospital v Superior Court* (1993) 19 Cal.App.4th 1289, 1293; *Fairmont Insurance Co. v Superior Court* (2000) 22 Cal 4th 245, 251)

#6. A meaningless distinction, such as putting the address of the disputed property at the top of a form, instead of as part of the answer to question #2, cannot be a valid basis for depriving a litigant of a federally protected right, such as his Seventh Amendment right to a trial by jury. (*United States v Mississippi* (1965) 380 U.S. 128, 132; *Adams v Murakami* (1991) 54 Cal 3d 105, 120; *Broad River Power Co. v South Carolina* (1930) 281 U.S. 537, 540)

#7. The eviction of a tenant at the absolute discretion of the landlord is subject to challenge under state and federal laws proscribing arbitrary discrimination. (*Reitman v Mulkey* (1967) 387 U.S. 369, 371; *Romer v Evans* (1996) 517 U.S. 620, 633; *Marina Point v Wolfson* (1982) 30 Cal 3d 721, 730)

#8. Judge Rushing's total exclusion of anti-discrimination law from jury instruction and near total refusal to allow evidence of discrimination violated *Shelley v Kraemer* (1948) 334 U.S. 1, 20; *Mulkey v Reitman* (1966) 64 Cal 2d 529, 538 and *Koebke v Bernardo Heights Country Club* (2005) 36 Cal 4th 824, 839-840.

#9. Where there has been no proven contract violation, there is no obligation for the loser to pay the prevailing party's attorney's fees, even if he has signed a contract with an attorney fees clause. (*Alyeska Pipeline Service Co. v Wilderness Society* (1975) 421 U.S. 240, 247; *Hsu v Abbara* (1995) 9 Cal 4th 863, 875; *Santisas v Goodin* (1998) 17 Cal 4th 599,602, 608-609, 617, 619)

#10. Judge Rushing deliberately trashed the

fundamental purpose of the strict limits on hearsay evidence "to preserve a party's Sixth Amendment right to confront and cross-examine an adverse witness and to disallow testimony coming from a witness who is not under oath and whose demeanor cannot be observed by the trier of fact." (*World-Wide Volkswagen Corp. v Woodson* (1980) 444 U.S. 286, 292; *Abstract Investment Co. v Hutchison* (1962) 204 Cal.App.2d 242, 249; *United States v Fowlie* (1994) 24 F.3d 1059, 1069)

#11. Judge Rushing's misuse of Evidence Code Sec 352 and other rulings to shield prejudicial evidence from being discredited, produced a judgment in violation of due process, thereby transgressing *Pennoyer v Neff* (1878) 95 U.S. 714, 732-733; *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1354; and *Baugess v Paine* (1978) 22 Cal 3d 626, 638.

#12. Charles Jensen and Judge Rushing have employed tactics ranging from evasions to outright obstruction of justice, to pave the way for a punitive attorney fees award based on faulty premises. (*Cooter & Gell v Hartmax* (1990) 496 U.S. 384, 405; *United States v Silverman* (1984) 745 F.2d 1386, 1395; *City of Shasta Lake v County of Shasta* (1999) 75 Cal.App.4th 1, 11)

#13. Court files and briefing schedules have been manipulated to produce a deliberately orchestrated miscarriage of justice. (*Joint Anti-Fascist Refugee Committee v McGrath* (1951) 341 U.S. 123, 170; *Windsor v McVeigh* (1876) 93 U.S. 274, 277; *United States v Walasek* (1975) 527 F.2d 676, 680)

#14. By forcing Defendants to "change horses in the middle of the stream" in the process of granting Charles Jensen fees for opposing aspects of Defendants' case, whose conduct by Michael Halliwell was unopposed at the time, Judge Rushing has deliberately sought to make it impossible for two self-represented litigants to effectively conduct their case. (*Faretta v California* (1967) 422 U.S. 806, 812-813; *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423; *Powers v Ohio* (1991) 499 U.S. 400, 410-411)

#15. Judge Chouteau has flouted Defendants' right to appeal (CCP Sec 902) from Judge Rushing's Judge Rushing's standing rulings. (*Nelson v Adams* (2000) 529 U.S. 460, 464; *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 198-199; *Conservatorship of Stewart* (1969) 276 Cal. App.2d 211, 215)

#16. Charles Jensen and Judge Rushing orchestrated the November 20, 2007 Exemption Claim Hearing and the run-up to it, to prevent James Parker from pointing out flaws in the excuse for circumventing the stay provisions for fees-only judgments. (*Jennings v Superior Court* (1967) 66 Cal 2d 867, 875-877; *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997; *Hall v Superior Court* (2005) 133 Cal.App.4th 908, 918-919)

#17. Judge Rushing's ruling that there had been no appeal of her $10,000 fees award was untenable when she made it, and it was a total fabrication when she acted off the record to circumvent the stay provisions of CCP 916(a) and turn over Defendants' $10,000 to Charles Jensen. (*Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655;

Nielson v Stumbos (1990) 226 Cal.App.3d 301, 303; *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736)

#18. At the September 25, 2008 Appeal Hearing, Judge Chouteau was resolute in his determination to prevent Defendants from effectively presenting their case. (*Baker v Carr* (1962) 369 U.S. 186, 204; *Warth v Seldin* (1975) 422 U.S. 490, 504; *20th Century Insurance Co. v Choong* (2000) 79 Cal.App.4th 1274, 1277)

#19. File tampering is a violation of Federal law against obstruction of justice (18 U.S.C. Sec 1503), which is serious enough to warrant adjudication whenever the opportunity finally presents itself. (*Mathews v Eldridge* (1976) 424 U.S. 319, 333; *United States v Neiswender* (1984) 590 F.2d 1269, 1272-1273; *Moore v Ogilvie* (1969) 394 U.S. 814, 816)

#20. Judges Rushing and Chouteau have used their various standing subterfuges to try to deprive Defendants of the most basic right under the United States Constitution: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." (*Marbury v. Madison* (1803) 5 U.S. 137, 163; *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1283; *Estate of Buchman* (1954) 123 Cal.App.2d 546, 560)

#21. Fraud and favoritism can never be allowed to replace the rule of law as the "coin of the realm" in the judicial process, and a judge who has been previously censured (CJP Inquiry #177) for such behavior must be subjected to close

judicial scrutiny on appeals involving unrebutted charges of deliberate judicial evasions. (*Yick Wo v Hopkins* (1886) 118 U.S. 356, 366-367, 373-374; *Hart v Massanari* (2001) 266 F.3d 1155, 1170; *Fuentes v Shevin* (1972) 407 U.S. 67, 80)

#22. The concealment of Judge Rushing's censure for dishonestly, admitted favoritism and seeking preferential treatment because her husband is a Court of Appeal Justice, and Charles Jensen's refusal to address the extent of his role in helping to save her job in these circumstances, is a proper occasion for retroactive exercise of a litigant's right of recusal against Judge Rushing and invalidation of everything she has done in this case. (*Bolling v Sharpe* (1954) 347 U.S. 497, 499; *Haworth v Superior Court* (2008) 164 Cal.App.4th 930, 942; *In re Gordon* (1996) 13 Cal 4th 472, 473)

#23. The integrity of judicial officers charged with fairly and even-handedly resolving disputes, is not simply a desirable characteristic which those making appointments to the bench hope to achieve, it is an enforceable right for litigants. *Kloepfer v Commission on Judicial Performance* (1989) 49 Cal 3d 826, 865; *Boddie v Connecticut* (1971) 401 U.S. 371, 375; *Armstrong v Manzo* (1965) 380 U.S. 545, 552)

#24. Whatever motions Plaintiff's may have, that rest on an implicit foundation that Sonoma County Superior Court rulings in his favor will emerge intact from the process of appellate review, should be continued until this review process is complete. (*Goldberg v Kelly* (1970) 397 U.S.254, 268-269; *Clark v Millsap* (1926) 197 Cal 765, 785; *Hernandez v Superior Court* (2004) 115

Cal.App.4th 1242, 1246)

#25. Defendants were forced to undergo **six** OEX hearings, subsequently found by Judge Robert S. Boyd to have been prematurely held, which impaired their ability to prosecute their appeals; such "second front" tactics by Plaintiff should not be allowed. (*Webster v Sowders* (1988) 846 F.2d 1032, 1040; *United States v Buffalano* (1984) 727 F.2d 50, 54; *United States v Russell* (1921) 255 U.S. 138, 143)

#26. On January 14, 2008 Judge Chouteau established a briefing schedule on fees aspects of the case which could not be briefed earlier because key (September 25, 2007 and November 20, 2007) transcripts were not available, but he "pulled the plug" on this briefing on February 5, 2008. Briefing was not reinstated until May 13, 2008 (a week after Judge Rushing granted $20,720 in additional fees to Charles Jensen, based on the alleged legitimacy of her rulings of September 25, 2007 and November 20, 2007). Defendants should be protected by the "poisoned fruit of a poisoned tree" doctrine from this sort of judicial manipulation. (*Nebbia v New York* (1934) 291 U.S. 502, 525; *Byrne & Manov v Nezhat* (2001) 261 F.3d 1075, n 110; *Front Royal and Warren County Industrial Park Corporation by Town of Front Royal Virginia* (1998) 135 F.3d 275)

#27. A fair trial in a fair tribunal is a basic requirement of due process. A summary denial of a writ petition cannot be given "law of the case" effect, to brush aside documented evidence of deliberate judicial obstruction of justice. And

higher courts have the power to investigate fraud whenever it is discovered. (*In re Murchison* (1955) 349 U.S. 133, 136; *Kowis v Howard* (1992) 3 Cal 4th 888, 897; *People v Malveaux* (1996) 50 Cal.App. 4th 1425, 1434)

#28. Except for a repeated "second and third front squeeze" created by the timing of Plaintiff's fees motions, and manipulation (by Judge Chouteau) of the timing of consideration of appeals from the granting of these motions (by Judge Rushing), Appellants would have been able to deal with a manageable number of issues in an orderly framework. However, the recent introduction of two new fronts (a $19,000 fees award and institution of a "vexatious litigant" proceeding by Judge Rushing) leaves no viable option for protecting Defendants rights under CCP Sec 1086, except a direct Mandamus Appeal to the California Supreme Court. (*Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851; *Gromeeko v Superior Court* (1952) 114 Cal.App.2d 754, 757; *Louie Queriolo Trucking v Superior Court* (1967) 252 Cal.App.2d 194, 197) (Id. at 32-36)

III. Grievances in Prior Petitions Foundational to Current Ones

While *Hagan* has been given much broader applicability, its own case circumstances have an important tie-in to *Paxinos v Halliwell & Parker*. *Hagan* notes: "The basic purpose of pretrial discovery, of which the taking of depositions is a part, is to expedite pending litigation (*Greyhound*

Corp. v. Superior Court (1961) 56 Cal 2d 355)." (57 Cal 2d at 770) Appendix G (29:22-25) notes: "On **July 26, 2007**, Charles Jensen asserted that 'counsel was under no obligation to educate the defendants in counsel's tactics at trial.' In fact, *Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 376 and *Chronicle Pub. Co. v Superior Court* (1960) 54 Cal 2d 548, 561, proclaim that legislatively mandated legal procedures are intended to do away 'with the sporting theory of litigation – namely, surprise at the trial.' Moreover, it was Charles Jensen's false claims with respect to service which allowed him to manipulate the time line to avoid providing the answers required in Form Interrogatories 71.7 & 77.1."

> Appellants' February 17, 2009 Petition re Corrective Mandamus gives some case history:
>
> Charles Jensen's obstructionist tactics which prevented any discovery, morphed into an attack on Defendants' right to a jury trial which eventually wiped out Defendants' right to contribute to jury instructions. Plaintiff's main thrust was a no-notice motion for summary judgment (in violation of the 5-day notice requirement of CCP Sec 1170.7). It turned out Defendant Halliwell was well enough versed in governing precedents relating to State and Federal protection against arbitrary discrimination to cite *Marina v Wolfson* (1982) 30 Cal. 3d 721, 730 and *Mulkey v Reitman*

(1966) 64 Cal 2d 528, 538 and codification of these holdings in AB 1400 (effective January 1, 2006). All that Charles Jensen could offer in response was his assertion that any application of *Marina*, beyond discrimination against children, was illegitimate. Judge Nadler took Jensen's summary judgment motion under advisement, and never did rule on it. Charles Jensen declined Judge Nadler's invitation to renew his motion before Judge Rushing (which he never did, perhaps because he no longer had the element of surprise working for him).

After winning only a draw on the constitutional law front, Charles Jensen suffered a reversal when Judge Nadler retreated from his initial ruling depriving Defendants of a jury (on the ground that they had put the address of their residence in the wrong part of their UD-150 counter request). It required a lot of effort from Defendants to prepare a persuasive motion to restore their jury, and they were bewildered by Judge Nadler's ruling that they should have found time to also prepare proposed jury instructions in anticipation of the success of their reconsideration motion. (See Transcript at 35:16-22) It turned out that the real reason Defendants were deprived of nearly 72 hours of the normal preparation time for jury instructions, which they were entitled to under Local Rule 4.10(H)(1), was to enable Judge Rushing to depart four hours before the normal court closing time of 4PM on Friday June 22, 2007. Defendants turned in their proposed jury instructions at Judge Rushing's courtroom a few minutes before the 12:00 noon deadline established by Judge Nadler. The

security guard was locking up the building at that time, and apparently Defendants' proposed instructions were left on Judge Rushing's desk for her consideration on the following Monday morning, June 25, 2007.

Although Charles Jensen had said he accepted the restoration of Defendants' right to a jury, he introduced a second motion to take away their jury on the ground of alleged format defects in Defendants' proposed instructions. Judge Rushing went along with Charles Jensen's attack on the format of Defendants' submission. Judge Rushing said: "They are in some form of a legal treatise, but they're not – they're not BAJI. They're not CALJIC." (Transcript at 166:23-25). Judge Rushing ruled that the lack of a timely submission by Defendants in the proper format constituted "a waiver of their right to submit anything in the form of a written statement to be read or the jury instructions. That time has come and gone." (Transcript at 169:21-23)

As far as the jury could tell from the instructions crafted by Charles Jensen and Judge Rushing, the Unruh Act did not exist, and only the single act of issuance of the 60-Day Notice was a fit subject for examination for retaliatory intent (not the decision to bring an Unlawful Detainer lawsuit, nor the decision to actually evict the tenants, which are explicitly affirmed in Civil Code Sec 1942.5 as relevant decisional benchmarks). Judge Rushing ruled that the jury could not consider whatever role was played by Mr. Paxinos in post-notice concealment of the nature of complaints against James Parker. She said:

"Well, his actions taken since the notice are irrelevant." (Transcript at 278:28 to 279:1) (Id. at 15-17).

The denial of a *Fairmont Insurance* (22 Cal 4th 245, 251) extension of the time for discovery, was one of the issues Defendants hoped would be clarified by a remand pursuant to their first (A121269) Petition. This issue is mentioned here, because denial of any discovery turned out to be the foundation for a much broader pattern of concealment. This discovery link certainly does not involve a perversion, **by Defendants**, of discovery procedures, so this *Hagan* factor is not an obstacle: "Thus, it now appears, that the District Court of Appeal, in order to prevent a circumvention of the time limitations on petitions for hearing and to prevent a perversion of discovery procedures, acted well within its discretion in denying the second application." (57 Cal 2d at 771)

Appellants' February 17, 2009 Petition re Corrective Mandamus discusses Due Process:

The pyramiding of fees awards upon fees, started with Defendants' grievances like this:]

Michael Halliwell tried to ask James Parker whether "there was any avenue whatsoever for you to get your side of this [complaint] into the hands of the Homeowner's Association before

they made their decision on this matter?" (Transcript at 285:4-7) Charles Jensen prevented James Parker from answering by intervening: "Objection, Your Honor. Relevance." (Transcript at 285:8) Judge Rushing ruled: "I'm going to sustain the objection." (Transcript at 285:9) Michael Halliwell asked landlord Gus Paxinos: "In exercising your right to elect to allow me to stay or not to stay, did you make any inquiries whatsoever from any source whatsoever about any characteristic whatsoever of Michael Halliwell?" (Transcript at 224:6-9) Charles Jensen intervened: "Objection, Your Honor. Relevance." (Transcript at 224:10) Judge Rushing ruled: "**Sustained.**" (Transcript at 224:11) Michael Halliwell responded: "I'm asking him about his decision making process, this is a discrimination case, and I don't understand how it could possibly be irrelevant [asking] how he is exercising his discretion." (Transcript at 224:12-15) Judge Rushing replied: "**I'm sustaining the objection.**" (Transcript at 224:16)

The broad scope of Judge Rushing's evasions and obstructionism in the course of trial proceedings makes this long-standing governing precedent highly relevant: "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (*Sunday Lake Iron Co. v Wakefield Township* (1918) 247 U.S. 350, 352) (Id. at 17-18)

Corrective Mandamus cites an abuse of rights:

Judge Rushing's gag rule (based on Defendant Michael Halliwell's alleged lack of standing) is an assault on Defendants' right of self representation affirmed in *Faretta v California* (1967) 422 U.S. 806, 812-813, and the mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423, "regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.'" Defendant Halliwell could not get a word in edgewise, with respect to Judge Rushing's edict silencing him: (Michael Halliwell: "Could I address it?" Judge Rushing: "No. I'm talking to Mr. Parker." (Transcript at 466:21-22)) Judge Rushing's gag rule was imposed with only this tenuous reference to supporting authority: "The statements I have just made are in the law library in all the practice books." (Ibid at 466:24-25) Judge Rushing then turned to Defendant Michael Halliwell and said: "And I am sorry, Mr. Halliwell, I'm not going to permit you to say anything in this argument at this hearing." (Ibid at 466:28 to 467:2) Michael Halliwell responded: "Not even on the central issue on whether I should be allowed to speak?" (Ibid at 467:3-4) Judge Rushing replied: "No, it's the same rule." (Ibid at 467:5) Michael Halliwell continued: "Well, I believe Your Honor is mistaken. I object for the record." (Ibid at 467:6-7) Judge Rushing terminated the discussion: "Mr. Halliwell, I've just made my ruling." (Ibid at 467:8) (Id. at 23-24)

Appellants' February 17, 2009 Petition re Corrective Mandamus says re standing denial:

Defendants' Appeal Reply Brief re the $20,720 fees award notes: "Charles Jensen concedes that Defendant Michael Halliwell is adversely affected by any attorney fees award to Plaintiff (Opposition at 3:9-11), as he dismissively observes: 'as they state ad nauseam throughout their papers they apparently have some sort of arrangement between them for Mr. Halliwell to pay ½ of the judgments and orders in this case.'" Having fully satisfied the injury-in-fact requirement and closeness of relationship requirement (having been evicted together), Defendants also satisfy the third *jus tertii* requirement of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114: "*The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.*" To try to deal effectively with aspects of the case previously handled by Defendant Halliwell, within the framework of Judge Rushing's ruling on standing, James Parker asked: "May I call Dr. Halliwell as a witness?" (Transcript at 473:3-4) Judge Rushing refused to allow this, saying: "No, this is not – live testimony is not permitted at Law & Motion. No witnesses testify at Law & Motion." (Ibid at 473:5-7)

The Appellate Branch ignored the mandate of *Warth v Seldin* (1975) 422 U.S. 490, 504, that the indirectness of an injury does not preclude standing. Moreover, even if Michael Halliwell and James Parker were not co-defendants, Halliwell would be allowed to defend his own interest in mitigating any fees award against Parker under the standing criteria set forth in

Powers v Ohio (1991) 499 U.S. 400, 410-411. This unfairness was greatly aggravated by sweeping aside Defendant Halliwell's undeniable standing in the appeal process to challenge Judge Rushing's standing ruling. *Aries Development Co. v Coastline Coastal Zone Conservation Commission* (1975) 48 Cal.App.3d 534, 542, and its supporting authorities specifically hold that the right to appeal directly accrues from a trial court's ruling that a party lacks standing with respect to a motion. Also, in addition, *United Investors Life Insurance Co. v Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303-1304, cites *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736, and numerous other authorities in support of its holding that "an appellate court has *jurisdiction* to determine whether a party has standing in prior proceedings. Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure Section 902." *Conservatorship of Stewart* (1969) 276 Cal.App.2d 211, 215 sums up: "In other words, *a party is 'aggrieved' by an order, within the meaning of section 902, even if his grievance turns out to be legally without merit.*" (Id. at 26-28)

Clearly, there has been a deep-rooted denial of Due Process of Law, which continues to have broad impact. This situation demands corrective Mandamus pursuant to CCP Sec 1086.

Postscript on submissions in aid of residual *sua sponte* jurisdiction per CRC 8.512(c)(2)

Regardless of the Court's view on the merits of

the serious charges raised by Defendants in this case, its willingness to accept our Appendices C, D, & E (which substantially exceeded normal page limitations which would otherwise have applied) indicated an awareness that the appearance of getting one's "day in court" is important in promoting public confidence in the fairness of the court system. However, the rejection of Appendices A & B, in Defendants' first appeal kept documentation of some of the worst examples of judicial high-handedness out of the record. This matter has been fully rectified in the acceptance of Appendices F & G in the course of (S170538) Mandamus proceedings. All of the important gaps created by the rejection of Appendices A & B have been filled by Appendices F & G, and there is nothing that Defendants tried to submit during the last few days of what seemed to be a 60-day jurisdictional period, that needs to be added to avoid prejudice to Defendants' right to seek review of the Federal aspects of their case in the United States Supreme Court.

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

Court of Appeal
First District
FILED
MAR 30 2009

COURT of APPEAL FIRST APPELLATE DISTRICT
Division Two **Case # A124403**

Michael Halliwell, et al,
Petitioners vs.

Superior Court of California, County of Sonoma, Respondent;

Chrysanthe Paxinos,
Real Party in Interest

Sonoma County
Case # MCV 191306

Appellants' Memo re Status of March 27, 2009 Update of Mandamus Petition **S170538** Transferred for Consideration in Light of *Hagans v Superior Court* (1962) 57 Cal 2d 767

On March 25, 2009, Defendants were putting together a second Update of their S170538 Mandamus to reflect fast moving developments since March 19, 2009, when we received the Supreme Court's Order transferring this matter to the Court of Appeal. The act of transfer itself made it clear that the Supreme Court wants to follow the normal pathway, of having our Petition for Mandamus considered in the first instance by the First District. Since the transfer order mandated "consideration in light of *Hagan v Superior Court* (1962) 57 Cal 2d 767," and this case emphasizes the importance of "unusual or changed circumstances," it seemed obvious that we should

promptly adapt our Update to analyze changed circumstances in light of the standards set forth in *Hagan*. Considering the nature of the "unusual or changed circumstances" (Judge Boyd sending Defendant James Parker to jail on Contempt of Court charges **issued without a transcript**, and Judge Rushing canceling a crucial March 24, 2009 hearing by issuing a Tentative Ruling **in violation of Local Rule 2.2D**), no reasonable person would have expected Defendants to prepare the accompanying March 27, 2009 Update and Appendix, any sooner than we did. It is difficult for Defendants to understand how Justice J. Anthony Kline can square the **timing** of his March 26, 2009 Order with basic fairness; and we herewith seek a proper remedy.

Dated this 30th day of March, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

The First District's Order of March 26, 2009, does not purport to find that S170538 is "substantially identical to a prior petition." Such a holding would be very difficult to defend in light of this Petition's focus on the Fourth and Fifth Front procedural squeeze created by Judge Rushing's $19,000 attorney fees award (not a factor in Defendants' procedural concerns until a sequence of events starting on February 2, 2009) and Judge Rushing's "vexatious litigant" initiative (which was filed on February 9, 2009, long after Defendants' previous Mandamus Petitions were filed). If Justice Kline's decision ("The petition for writ of mandate is denied") is unchanged by Appellants' March 27, 2009 Update and Appendix, an Order to that effect can get the case promptly back on track. If the Court of Appeal wishes to insist that March 26, 2009 is the proper starting date for the ten days allowed for seeking review by the California Supreme Court, the confirming order should specify whether filing in the Supreme Court by the time of normal mail delivery on Monday April 6, 2009, would be considered as meeting the deadline, for Supreme Court review.

The remainder of this Memo explains why consideration by the Court of Appeal, of the accompanying March 27, 2009 documents, is in keeping with the spirit of "consideration in light of *Hagan*." One of the recent cases citing *Hagan*, gives *Abelleira v District Court of Appeal* (1941) 17 Cal 2d 280, as a supporting precedent. Judge Boyd's lack of jurisdiction to undertake enforcement action for the $20,720 attorney fees award (which is the basis of OEX proceedings) was clearcut under CCP Sec 916(a), when state court appeals were the issue. No lesser standard of protection for (an attorney's-fees-only judgment debtor's) federal rights has been asserted in any California court decision Defendants have seen; and Judge Boyd certainly cited no such basis for his enforcement action (which would make federal appeal rights nugatory).

Abelleira v District Court of Appeal (1941) 17 Cal 2d 280 302-303 analyzes jurisdiction:

> The final contention is advanced that though all of the above conclusions may be entirely correct, and that in consequence the District Court of Appeal has no jurisdiction to hear and determine the merits of the case, nevertheless it has power to hear and determine the question whether it has jurisdiction. . . . *If that is true as applied to*

this case, then there is no control over unauthorized, arbitrary assumptions of judicial power except the slow process of appeal or petition for hearing. We cannot, of course, lightly accept such a destructive doctrine, and it must be rejected unless compelled by the strongest logic and precedent. But upon careful study and examination of the authorities cited, we find neither. . . . . The jurisdiction to determine jurisdiction has been fully exercised by a determination in favor of jurisdiction over the cause; the question is no longer of jurisdiction to determine, but of jurisdiction to act. And jurisdiction to act is always a subject of inquiry by a higher court.

Abelleira v District Court of Appeal (1941) 17 Cal 2d 280, 304 says of mandamus power:

To say that the District Court of Appeal, left alone, may ultimately reach the same conclusion as we do here, and therefore should not be restrained, is no longer an answer. The writ of prohibition is not refused nor held in abeyance because the lower tribunal may ultimately realize the error of its assumption of jurisdiction; it is granted at the time the act in excess of jurisdiction occurs.

Griffin v Municipal Court (1977) 20 Cal 3d 300, 309, fn 9 applies *Hagan* in a context where the appropriately high standard set for "substantially identical" relief is discussed:

As we stated in Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770-771, "in the orderly adminis-

> tration of justice, and in support of a sound judicial policy, a court, in the absence of unusual or changed circumstances, ... is justified, in its discretion, in refusing to consider repetitive applications of the same petition." The subpoena request in question precisely parallels the request that was rejected in defendants' earlier writ proceeding (see fn. 4, ante), and constitutes a "repetitive application" for the same relief. Accordingly, without passing on the merits of the subpoena request, we conclude that this aspect of the municipal court's ruling should not be overturned.

The appropriateness of Defendants' citing evasiveness in discovery (as a factor in fees awards) at (what seemed until recently to be) the end of state court proceedings, is supported by *Rosemont v Superior Court* (1964) 60 Cal 2d 709, 712:

> The lengthy history of this litigation, however, demonstrates the need for caution in granting interim review of discovery orders, lest the basic purpose of pretrial discovery to expedite litigation be thwarted. (Hagan v. Superior Court (1962) 57 Cal 2d 767, 770.)

The absence of any "law of the case" effect of prior writ denials is supported by rejection of such a suggestion in *Gomez v Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921, 924:

> Defendants contend that this constitutes a binding adjudication on appeal. This is so only where the appellate court renders a decision and,

in deciding the appeal, states a principle or rule of law necessary to the decision which then becomes the law of the case. Here, the appellate court did not decide anything regarding the merits of plaintiff's case; it merely ruled that, on the facts set forth in his petition, he was not entitled to extraordinary relief. Defendants' contention is mistaken. (Hagan v. Superior Court (1962) 57 Cal 2d 767, 770; Rosato v Superior Court (1975) 51 Cal.App.3d 190, 230.)

There is a *Hagan* application in *Kowis v Howard* (1992) 3 Cal 4th 888, 895-896:

In Hagan v Superior Court (1962) 57 Cal 2d 767, 770, we stated: "The rule is well settled that a denial by this or the appellate court of an application for a writ without opinion 'is not res judicata of the legal issues presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits.'" (Quoting McDonough v Garrison (1945) 68 Cal.App.2d 318, 325.)

Kowis goes on to eliminate the narrow exception provided in *Hagan*, *supra*:

If a writ petition is given full review by issuance of an alternative writ, the opportunity for oral argument, and a written opinion, the parties have received all the rights and consideration accorded a normal appeal. Granting the resulting opinion law of the case status as if it had been an appellate decision is appropriate. But if the denial followed a less rigorous procedure, it should not establish law of the case. To be sure, the

court on a later appeal might often reach the same result as before. But it is not required to do so by the law of the case doctrine. For these reasons we reject the "sole possible ground" exception to the general rule. A summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason. (3 Cal 4th at 899)

Kowis explains part of its rationale for rejecting the prior exception to the general rule:

When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review. (3 Cal 4th at 897)

Kowis rules out brief explanatory statements as a basis for not applying the general rule:

While it is true that the court accompanied the summary denial with an explanatory comment, we do not regard that comment as a formal opinion (Cal. Const., art VI, sec 14) precluding this court from considering the issue anew upon this hearing at which the parties have had an opportunity to brief and argue the case in full. [Citations.] One important incident to the right of appeal from a superior court's judgment is the right to present oral argument before the appellate court. [Citations.] (3 Cal 4th at 895)

Kowis emphasizes the value of oral argument, in creating "law of the case":

In recent years, we have recognized the importance of oral argument as an incident of appellate

review. (Moles v Regents of University of California (1982) 32 Cal 3d 867, 871; People v Brigham (1979) 25 Cal 3d 283, 286-288 (3 Cal 4th at 899) In Moles, supra, we suggested that the right to oral argument exists in any appeal or original proceeding decided on the merits. (3 Cal 4th at 899)

Kowis approves a foundational holding in *People v Medina* (1972) 6 Cal 3d 484, 489:

Important incidents of the right to appeal from a superior court's judgment are the right to present oral argument in the appellate court [citations] and the right to a written opinion pursuant to the state constitutional requirement that 'Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.' (Cal. Const., art VI, sec 14.) (3 Cal 4th at 894)

Kowis notes procedures that would pay important dividends in the case at bar:

[An appellate] court may "upon ascertaining that the petition is in proper form and states a basis for relief, issue an alternative writ which commands the respondent to act in conformity with the prayer of the petition or, alternatively show cause before the Court of Appeal why it should not be ordered to so act. The respondent may choose to act in conformity with the prayer, in which case the petition becomes moot; otherwise, the respondent and/or the real party in interest may file a written return setting forth the factual and legal bases which justify the respondent's refusal to do so. The matter is then a 'cause' to be

> decided in 'writing with reasons stated' . . . . The issues joined by the petition and return must therefore be decided by the Court of Appeal in a written opinion. (3 Cal 4th at 893)

A Writ of Supersedeas (which stops the clock, and provides breathing space for the Defendants to exercise their federal appeal rights) is necessary to make a reality of this broadly applicable mandate in *Abelleira v District Court of Appeal* (1941) 17 Cal 2d 280, 293:

> The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it.

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

First District
Court of Appeal
Division Two
Case # A124403

CALIFORNIA SUPREME COURT S171792

Sonoma County
Case # MCV 191306

Michael Halliwell, et al,
Petitioner vs.

Superior Court of
California, County of
Sonoma, Respondent;

Chrysanthe Paxinos,
Real Party in Interest

FILED APR 6 2009
Clerk Supreme Court

Defendants/Appellants' Petition for Review of the Court of Appeal Denial of Appellants' February 17, 2009 Petition for Mandamus (and Subsequent Updates)

Should this Court issue an alternate writ pursuant to this petition, it would consist of a Writ of Supersedeas, to preclude lower court activity in this case until May 18, 2009 (thereby preventing interference with Defendants' right to appeal to the United States Supreme Court pursuant to 28 U.S.C. Sec 1257). Defendants now face "Extra Front" infringement on what remains of their 90 day statutory time to prepare a Petition for Certiorari from three directions: **a)** a briefing schedule which might be issued at any time re Defendant's March 10, 2009 appeal of a $19,000 attorney fees award (premised on the validity of rulings subject to

reversal on federal grounds by the United States Supreme Court); **b)** proceedings initiated by Judge Elaine Rushing slated for hearing on April 14, 2009 (premised on the concept that Defendants' Petitions for discretionary review of Appellate Branch Orders affirming her trial court rulings constitute frivolous challenges to finally settled matters) and **c)** OEX proceedings before Judge Robert S. Boyd slated to resume on April 21, 2009 (premised on the concept that the right to appeal to the United States Supreme Court may be circumvented, by state court judge's enforcement activity which would render nugatory appeals from the underlying state court judgment). There is nothing in this Petition which is "substantially identical" to relief sought previously.

Dated this 3rd day of April, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

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INTRODUCTION

Defendants have been prevented by "Procedural War Games" (judicial maneuvers which vitiate, or flatly ignore, California Rules of Court and the California Code of Civil Procedure) from securing consideration of a Petition for a Writ of Supersedeas in lower courts, and have not previously sought such relief from the California Supreme Court. The main focus of this Petition is *to prevent the infringements of bedrock Due Process of Law rights from getting worse*, but Defendants also seek such rectification as is practical for past abuses. To stay clear of the "substantially identical" barrier to relief, cited in this Court's March 24, 2009 transfer order (mandating evaluation of our S170538 Petition in light of *Hagan v Superior Court* (1962) 57 Cal 2d 767), retrospective relief is addressed in the accompanying separate Appendix J. However, the nature of current threats to Defendants' procedural rights (and crafting appropriate remedies) requires consideration of previous procedural abuses. Such references are nearly all quotations from briefing, where the opposition and all judges have made absolutely no factual or legal response.

Defendants' Petition is based on CCP Sec 1086 which provides for a writ of mandate "in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (*Simmons v Superior Court* (1950) 96 Cal.App.2d 119, 132; *Louie Queriolo Trucking Co. v Superior Court* (1967) 252 Cal.App.2d 194, 197; *Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851.) A clear demonstration of deliberate obstructionism by lower court judges must be sufficient to invoke CCP Sec 1086, because otherwise any reasonable person aware of the facts could not be confident of the fairness and impartiality of the court system. (Canon 1 of Judicial Code of Ethics.)

Section A starts with a review of the fate of Defendants' efforts to postpone the February 10, 2009 hearing, where Judge Rushing added $19,000 to her prior fees awards of $10,118 and $20,720. The middle part of this section shows how Judge Nadler's threat to deprive Defendants of their right to a jury trial and his implicit support (he was operating off the record) for a *judicially unreviewable $4,000 payment* to Charles Jensen, started a process whereby fees awards have escalated "hand over fist."

The last part of **Section A** explains why it is essential that the $19,000 fees award be "put on the back burner" until the validity of previous fees awards has been finally decided (including federal appeals based on Defendants' Fourteenth Amendment Due Process rights).

Section B could cover the entire case, since this is the basis of Judge Rushing's "vexatious litigant" challenge. This section starts by reviewing the denial of fair notice and opportunity to be heard from the very outset of the case. The next part of **Section B** deals with the *resolute refusal* of any Sonoma County judge to evaluate Defendants' formal protests re the use of perjury and flouting of Local Rules by Plaintiff's counsel to advance his cause. **Section B** continues with an examination of deliberate manipulation of the appeal process (especially relating to transcript preparation and the integrity of files) to uphold Judge Rushing's rulings without a meaningful examination of their merits. **Section B** concludes with a summary of the most important evasions by Judge Rushing (which she seeks to shield from examination by having Defendants' related appeals labeled "frivolous").

Section C starts with an explanation of why divulging any financial information poses a "clear and present danger" of irreparable damage to Defendants' rights (based on the tactics used by Judge Rushing to turn over $10,118 of Defendants' assets to Charles Jensen without the barest semblance of legal process). The next part of **Section C** deals with the total breakdown (fully manifest in Judge Boyd's own court) of Defendants' right to conduct their own case in accordance with *Gray v Justice's Court* (1937) 18 Cal.App. 2d 420, 423. **Section C** continues with a demonstration that Plaintiff's counsel has forfeited any right to discovery of Defendants' financial assets, by his own discovery abuses. The last part of **Section C** starts with a review of the use of contempt of court threats by Judges Nadler and Rushing, continues by reviewing the use of such threats at six OEX hearings where the judges involved (Judge Andrea K. Richey and Judge Robert S. Boyd) backed away from forcing compliance with unlawful orders, and concludes with Judge Boyd's imposition of a Contempt of Court jail sentence (without a supporting transcript) and related habeas corpus proceedings.

There has been a recent hopeful change in what appeared to be a disdainful and uncooperative attitude in the handling of our case by the First District Court of Appeal. After the dismaying refusal of Judge Robert S. Boyd to give meaningful consideration to James Parker's last minute (March 20, 2009) plea for a stay of the three-day jail sentence Judge Boyd had announced at a March 17, 2009 OEX hearing, a deputy clerk (Mery) at the First District's San Francisco office was very helpful. With less than three hours left before the scheduled start of James Parker's jail sentence, he submitted what was the beginning of a petition for a Writ of Habeas Corpus, which this deputy clerk helped him to modify into an acceptable format. (Although this Habeas petition was denied, prompt notification by telephone was invaluable in helping Defendants to get started on a much better effort, which was mailed on March 22, 2009). Although there was a potential problem related to jail regulations that made it necessary for Co-Defendant Michael Halliwell to submit the March 22nd Petition on James Parker's behalf, we have been spared any hassle related to the fact that Michael Halliwell is not an attorney.

Because James Parker's jail sentence fundamentally altered the posture of the case (and interfered with Defendants' ability to promptly respond to case developments), we were not able to submit our March 27, 2009 Mandamus Update before the California Supreme Court transferred S170538 to the First District Court of Appeal. However, Defendants experienced no difficulty in having our March 27th Update (and its supporting Appendices G, H, and I) accepted by the First District, along with our explanatory Memo addressing recent developments in light of *Hagan v Superior Court*, *supra*. As the accompanying First District Order of March 30, 2009 shows, Defendants' March 22, 2009 Habeas Petition was denied. However, we are pleased that our March 22nd Petition apparently received several days of consideration before it was found insufficient. Since the March 30, 2009 Order relates to an important aspect of the procedural relief now requested pursuant to S170538, Defendants are filing our Petition for review now (to provide a slight margin re potential deadline problems). Should this filing be considered premature for any reason, Defendants have no

objection to having it converted into an Update for consideration by the First District Court of Appeal.

Our latest Update says:

> On March 25, 2009, Defendants were putting together a second Update of their S170538 Mandamus to reflect fast moving developments since March 19, 2009, when we received the Supreme Court's Order transferring this matter to the Court of Appeal. The act of transfer itself made it clear that the Supreme Court wants to follow the normal pathway, of having our Petition for Mandamus considered in the first instance by the First District. Since the transfer order mandated "consideration in light of *Hagan v Superior Court* (1962) 57 Cal 2d 767," and this case emphasizes the importance of "unusual or changed circumstances," it seemed obvious that we should *promptly* adapt our Update to analyze changed circumstances in light of the standards set forth in *Hagan*. Considering the nature of the "unusual or changed circumstances" (Judge Boyd sending Defendant James Parker to jail on Contempt of Court charges **issued without a transcript**, and Judge Rushing canceling a crucial March 24, 2009 hearing by issuing a Tentative Ruling **in violation of Local Rule 2.2D**), no reasonable person would have expected Defendants to prepare the accompanying March 27, 2009 Update and Appendix, any sooner than we did. (Id. at 1)

A. Delay Appeal Briefing re February 10, 2009 $19,000 Attorney Fees Award

Real Party's $19,000 fees motion was timed

so that briefing would overlap OEX proceedings aimed at enforcement of a $20,720 prior fees award, which was still in the appeal process. However, on January 20, 2009, Judge Robert Boyd recognized that these OEX proceedings were premature, and granted a recess (long enough to allow the California Supreme Court enough time to rule on the $20,720 fees award). When Defendants were able to turn their attention to the $19,000 fees motion, they tried to secure a postponement, until they were able to complete action on other aspects of the case (perhaps including resumption of OEX proceedings and federal appeals of adverse rulings by the California Supreme Court). However, these postponement efforts were ignored, or delayed to the point where it was too late to prevent a February 10, 2009 hearing on the $19,000 fees motion from taking place. From the very beginning of the case, Defendants were never able to secure normal handling of fees matters, and they were often tied up trying to rectify previous violations of their procedural rights, while the next fees motion went forward.

1. February 25, 2009 & March 24, 2009 action re Defendants' stay motion

Appellants' February 17, 2009 Mandamus Petition (S170538) cites recent events:

Defendants' February 2, 2009 Petition sought a preliminary ruling from Sonoma County Superior Court Presiding Judge Knoel Owen on whether

Appellate Branch Presiding Judge Rene Auguste Chouteau should play a role in deciding on the Petition for a Writ of Supersedeas, which Defendants intended to submit. The February 2nd Petition raised the issue of what Defendants feel has been Judge Chouteau's obstructionism in appeal scheduling matters (such as his pulling the plug on scheduled appeal briefing on February 5, 2008 and not reinstating briefing until May 13, 2008). On February 3, 2009, Defendants filed their Supersedeas Petition, which sought cancellation of a February 10, 2009 Fees hearing (on the ground that its briefing schedule overlapped a period of time when Defendants were fully occupied with Appeal and OEX matters). Both Petitions thoroughly reviewed Defendants' California Supreme Court filings to demonstrate the strong Federal component of most of Defendants' grievances. (Thus, however pending decisions by the California Supreme Court on whether to grant review are resolved, Defendants face a very substantial preparation and drafting task in seeking to protect their federal rights, in whatever forum remains open). No action was taken on the February 2nd or February 3rd Petitions. Defendants attempted to file their February 9, 2009 Motion for a Stay of Trial Court Proceedings (which added numerous citations of federal caselaw in support of their various grievances, and reasserted Defendants' right to cancellation of the February 10, 2009 fees hearing, which sought to impose a severe ($19,000) penalty on Defendants for devoting their attention to protection of their Federal rights). Apparently, Judge Rushing has asserted the notion that (in the

> sensitive situation created by her prior conduct in the case) she should be the sole arbiter of when to schedule further fees motions. The filing clerks in Room 107J departed from their established practice of accepting extraordinary petitions for consideration by whatever judge(s) were later determined to be appropriate. In this instance they insisted on deferring to Judge Rushing on the disposition of Defendants' February 9th motion. Judge Rushing decided that the February 9th motion to cancel the February 10, 2009 Fees hearing, be placed on her March 24, 2009 Law & Motion calendar, thereby completely defeating the purpose of the motion. (Id. at 28-29)

> On February 25, 2009 Judge Knoel Owen responded (copy attached) as follows:

> I am in receipt of you letter dated February 1, 2009, as well as your Petition to Presiding Judge Knoel Owen Re Appeal Panel to Decide Petition for Supersedeas filed on February 2, 2009, and Defendants' Supersedeas Petition Re Trial Court Proceedings During Pendency of Fees-Related Appeals filed on February 3, 2009.

> Your petition is being denied at this time as the relief your are requesting is unclear and the petition itself is procedurally insufficient.

This reply came much too late to deal with the subject matter of Defendants' early February submissions. Defendants sought clarification of the procedural defects in their petitions to Judge Owen, which elicited the following reply (copy attached): "I

am in receipt of your letter dated March 6, 2009. I am unable to provide legal advice, particularly on cases presently pending in court."

2. Piling fees upon fees starts with judicially unreviewable $4,000 demand

Defendants cite Plaintiff's use of one fees demand to gain leverage for another:

> The attached agreement is for 'reasonable attorney's fees,' which is defined by Local Rule 2.2E as $375 (INCLUDING a normal court trial). BEFORE Judge Nadler handed down his ruling granting Charles Jensen's motion giving primacy to his request for a court trial (and obviously before normal court trial expenses had been incurred), Mr. Jensen was demanding an unreasonable $4,000 payment as a condition for allowing a reasonable amount of time for Mr. Parker to find and move into another suitable residence, before being evicted." (CI 0331, 0290) Defendants believe Charles Jensen is using the same tactic again to try to force Defendant James Parker to capitulate and pay the $20,000 attorney's fee award he has appealed. (*Jensen sets the due date for Parker's Opening brief (October 6, 2008), as the expiration date for an offer not to seek an additional $7,800 in attorney's fees*). See his attached letter of September 26, 2008. (Appendix H **[98:22 to 99:4]**)

Judge Boyd lets James Parker explain the impact of his current procedural squeeze:

> The next to last page of our statement deals with a February 25, 2009 rejection of our February 3rd,

2009 effort to make arrangements for consideration of a petition for supersedeas, which sought to block a February 10th, 2009 fees hearing. The last page deals with the diversion of our subsequent effort to postpone the February 10th hearing on to Judge Rushing's March 24th, 2009 Law & Motion Calendar. *We do not understand why such denials by delay could be appropriate.*

We expect we will have this situation unraveled by March 26, 2009. OEX proceedings before March 26th would interfere with our effort to stay out of a "two-front squeeze," and would, therefore, be a de facto denial of our due process rights. So therefore, I would ask the Court that this hearing be postponed till at least March 26th, which is only nine days, approximately, so we can resolve this other issue in Judge Rushing's court, which may have some bearing on [time we can spend preparing for] this Court. (Transcript at 10:11 to 11:3) (Appendix I ***7:21 to 8:4***)

3. Due Process right to unobstructed preparation of our federal appeals

Defendants point out Real Party's evasiveness re procedural obstructionism:

In his October 27, 2008 Reply Brief (LNT at 9:18-19) Charles Jensen asserts: "There has been no intent on the part of counsel to rob these litigants of due process." This is a reference to James Parker's protest at the May 6, 2008 hearing that Charles Jensen "brought a two-pronged attack against us" in deliberately timing his $20,720 fees motion so that it would reach a critical juncture when defendants faced crucial filing

deadlines with respect to Judge Rushing's earlier award of $10,000 in attorney's fees (Transcript at 6:8-10). Plaintiff's co-counsel Kadin Blonski responded "we're under no obligation to time our motions to go along with whatever they have going on." (Transcript at 9:18-20) Mr. Blonski also added this false statement in support of his two-pronged tactic: "There's been no motion at all for a continuance other than what was just made orally." (Transcript at 9:14-15) Charles Jensen knew this to be false because he received a copy of Defendants' April 30, 2008 Petition to Postpone May 6, 2008 Hearing on Attorneys Fees (CI 3710-3714). (Appendix H **[91:15-23]**)

Defendant James Parker analyzes the repeated scheduling problems in the case:

Parker's May 5 Affidavit re May 5, 2008 Tentative Ruling (2:21 to 3:9) notes:

Charles Jensen's demand for $20,000 in fees for having to read the "irreverent dribble" produced by Defendants, because "even a blind pig can find a truffle every now and then" was timed for maximum disruption of Defendants' appeals to the First Circuit Court of Appeal and the California Supreme Court. In their April 30 (1:02 PM), 2008 Petition to Presiding Judge Knoel Owen to Postpone the May 6, 2008 Hearing on Attorneys Fees, Defendants argued that before any award of fees for opposing Defendants' appeals should be considered, the appeal briefing schedule abrogated by the Order of February 5, 2008 should be reinstated and completed. (Appendix H **[86:14-20]**)

Defendants reminded Presiding Judge Owen in

an October 14, 2008 petition:

> On April 30, 2008, in full compliance with everything the window clerks asked of them, Defendants filed their "Petition to Presiding Judge Knoel Owen to Postpone May 6, 2008 Hearing on Attorneys Fees." The window clerks informed Defendants to check Box 73 in the Hall of Justice for a response. They checked Box 73 repeatedly up until the May 6, 2008 hearing was upon them, but no action was apparently taken on this motion. (Appendix H **[90:7-11]**)

B. Vacate April 14, 2009 "Vexatious Litigant" Hearing Set by Judge Rushing

The thrust of Judge Rushing's "Vexatious Litigant" initiative is to attempt to shut down Defendants' discretionary appeals, on the theory that rulings in her favor by the Appellate Branch amount to final dispositions. If any of these appeals were indeed frivolous, it would be a simple matter to quote the binding legal principles which were violated by Defendants' claims for relief, but neither Judge Rushing nor any of the Judges ruling in her favor have EVER given ANY reasons for their rulings. Defendants NEVER received a meaningful hearing on their expedited consideration grievances, their service perjury complaints, the lack of file integrity which allowed these procedural outrages to take place, or Judge Rushing's flouting of rules of evidence and governing precedents in her jury instructions.

4. Violation of fair notice and opportunity to be heard Due Process rights

Defendants explain their June 4, 2007 response to Plaintiff's complaint:

> Defendants challenged a false claim of personal service which gave them only five days to Answer the Summons and Complaint instead of the 15 days they would have had if Plaintiff had been honest about the method of service used. Defendants asked that Plaintiff be required to "*Provide Proofs of Service missing from Case File*" and that the Court "*Postpone requested trial date 10 days.*" Defendants' motion also said: "*Once a legally adequate complaint is provided, Mr. Jensen can simply hand it to Defendants, and the Proof of Service issue will vanish. But until then, how service was performed is a critical issue, since false claims in this area have deprived Defendants of ten badly needed days of preparation time. Once Defendants know the outlines of Plaintiff's case, and their side promptly replies to requests for admissions and other discovery requests, we may be prepared to go to a jury trial on June 29, 2007. If not, we will cite any lack of cooperation by Plaintiff which requires a further continuance.*" (Appendix H **[11:25 to 12:14]**)

There was no opportunity for oral argument on this motion, and Judge Nadler denied our written Ex Parte Application with no explanation. Due Process requires an opportunity to explain one's grievances personally to the decision making official.

In *Goldberg v Kelly* (1970) 397 U.S. 254, 268-269 the opinion states: "[The person facing property deprivation] is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. *These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.* Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." (Appendix H **[95:11-16]**)

5. Lack of recourse from Plaintiff's perjury and flouting of Local Rules

Defendants discuss Charles Jensen's continued evasiveness about service:

Charles Jensen has tiptoed around embarrassing facts related to his false claims of service which are set forth in Defendant's Affidavit of July 27, 2007, which show that he cannot have testified truthfully in the affirmations on this subject he made in his June 14, 2007 Declaration. This includes a) the fact that James Parker was not alone on June 2, 2007 at 7:45 when a "personal service" was alleged to have taken place, b) the fact that the nearest approach to the alleged June 2, 2007 personal service was a mailing of papers which was postmarked June 4, 2007, c) the fact that Plaintiff was notified in a letter of June 11, 2007 of the failure of his attempts at service to that point failed to satisfy the requirements of CCP sec 415.45 (a) & (b), and d) the fact that a flagrantly inadequate tossing of the summons

> and complaint over our fence on June 1, 2007 (that was described as having been delivered otherwise in these same papers) forced Defendants' to respond in their Answers of June 4, 2007. (Appendix H **[47:10-18]**)

Appendix G (54:16-24) and our March 20, 2008 Motion for Reconsideration quote *The 1880 Corporation v Superior Court*, which refutes the claim that Defendants' efforts to secure enforcement of service requirements constituted a general appearance. Appendix G (18:18 to 19:12) bolsters *The 1880 Corporation* with quotations from *Pease v City of San Diego* and *Parsons v Superior Court of Marin County*, which reject the contention that Defendants' challenges to the adequacy of service could somehow be twisted into a general appearance.

6. Manipulation of appeal scheduling to obstruct evaluation of merits

Appendix G (59:9 to 60:10) quotes Defendants' early protests re File Integrity:

To preclude Defendants' discovery, file tampering followed service fraud:

Defendant's July 19, 2007 Affidavit re Plaintiff's Misrepresented Filings says:

> On June 11, 2007 both Defendant Mike Halliwell and the window clerk in room 107J inspected the Case File, and determined that

> the ONLY documents in the file from Plaintiff were the Summons and Complaint filed June 1, 2007. Defendant both served on Mr. Jensen and filed a **Complete Listing of Documents in File except Defendants' filings** (as of June 11, 2007 at approximately 10:00 AM); and the accuracy of this listing was NEVER challenged by Plaintiff's counsel in subsequent proceedings. (Notable in their absence were Plaintiff's Proofs of Service and Form UD-150 that later turned up in the file Stamped as Filed on JUN 6 2007.) (CR-250:15-22)
>
> Leaving aside the serious matter of how Mr. Jensen's BRIGHT BLUE form UD-150 could have been overlooked in the Case File on June 11, 2007 (when Defendant Mike Halliwell had a deputy clerk photocopy all fourteen pages in the file not submitted by Defendants, and initial "C.O." to verify that there were only these fourteen pages not submitted by Defendants, and so attested in his affidavit of that date), the fact remains that **form UD-150 and every applicable precedent contemplates that the other side will have up to five days to submit a Counter-Request BEFORE any decision is made setting the case for trial.**

Appendix G (21:17-25) and the January 24, 2008 Appeal Transcript quote Judge Chouteau's assurance that matters relating to the September 25, 2007 trial court transcript was "a different issue which is on our June calendar." However, the Order of March

6, 2008 expanded its scope to embrace appeals "from any post-judgment orders."

Defendants discuss the broader implications of transcript preparation delays:

> It is not a coincidence that when Defendants lost their right to protect against file tampering and facilitate references, a period of "slow walk" re preparation of the court's chronological index (which serves the same function as Defendants' Case Record serial numbering) consumed three months (from February 4, 2008 until May 13, 2008). In this same time period (while Defendants were working on their Supreme Court filing due on May 5, 2008) other procedural obstacles were placed in Defendants' path. (Appendix H **[91:9-13]**)

Defendants discuss denial of their plea for separate appeal hearings:

> On January 22, 2007 Defendants petitioned the Sonoma County Superior Court Presiding Judge, seeking separate hearings on later appeals which had been "lumped in" with the their July 24, 2007 jury trial appeal, in spite of the lack of transcripts and other supporting documentation for these later appeals, which prevented appropriate briefing. (Appendix H **[35:4-9]**)

Defendants review the history of the File Integrity issue in the case:

> On February 4, 2008 Defendants petitioned Presiding Judge Knoel Owen:
>
> > The integrity of Court Files has been an issue

from the outset of this case. In proceedings before Judge Gary Nadler, Plaintiff's Proofs of Service and Form UD-150 were NOT in the Case File when inspected, photocopied and initialed by window clerk "C.O." on June 11, 2007. These documents turned up much later (inserted as if they had been filed on June 6, 2007) and played a key role in Judge Nadler's denial of a continuance which was probably the most decisive factor in our case. Because of this history, Defendants were allowed to supply copies of all documents marked with Case Record sequential numbering for use in their appeals. (CR-1908)

By "direction of the judges" court clerks refused to allow Defendants accompanying proffered Designation in lieu of a missing Chronological Index. *It appears that this policy change may have been influenced by Assistant Presiding Judge Nadler or by Supervising Civil Court Judge Rushing, and thusly, it falls short of minimum Due Process of Law Standards. It should be reversed forthwith, and appeals briefing should be reinstated at once with respect to the integrity of files issue.* (CR-1908)

This motion was referred to Judge Chouteau, who signed this order on April 18, 2008, and filed it May 23, 2008: "Appellant's Petition re No-Notice Change is denied." (Appendix H **[36:6-19]**)

7. Judge Rushing's evasions she seeks to protect from effective review

Appendix G (62:12 to 63:3) discusses further

maneuvering relating to the admission of Exhibit 5 by Judge Rushing. This includes Judge Rushing's slamming the door on Defendants' efforts to find out the contents of a March 26, 2007 Homeowner's Association "Report" (June 25, 2007 Transcript at 162:27 to 163:2), an unrecorded Conference at the Bench (mentioned in the Transcript at 198:2-7), and Judge Rushing's promise to discuss Exhibit 5 and other concerns of Defendants (Transcript at 442:8-10). Defendants complained about Judge Rushing's failure to make good this commitment: "Judge Rushing addressed every OTHER issue raised by either side, but then backed off from trying to justify her handling of Exhibit 5. She simply wound up the discussion by saying: "I'm not making any further rulings than that. We are going to be in adjournment." Appendix G (63:4-18) provides further details on Judge Rushing's deferring consideration of Defendants' challenge to Exhibit 5 (Transcript at 316:3-4), including offering to discuss this motion at a sidebar (Transcript at 316:23 to 317:5). Judge Rushing withdrew this offer, and rejected Defendants' motion without explanation, saying: "We don't need a sidebar."

Appellants' February 17, 2009 Mandamus Petition (S170538) documents Judge Rushing's refusal to allow Defendants to present their case at trial:

> Michael Halliwell tried to ask James Parker whether "there was any avenue whatsoever for you to get your side of this [complaint] into the hands of the Homeowner's Association before they made their decision on this matter?" (Transcript at 285:4-7) Charles Jensen prevented James Parker from answering by intervening: "Objection, Your Honor. Relevance." (Transcript at 285:8) Judge Rushing ruled: "I'm going to sustain the objection." (Transcript at 285:9) Michael Halliwell asked landlord Gus Paxinos: "In exercising your right to elect to allow me to stay or not to stay, did you make any inquiries whatsoever from any source whatsoever about any characteristic whatsoever of Michael Halliwell?" (Transcript at 224:6-9) Charles Jensen intervened: "Objection, Your Honor. Relevance." (Transcript at 224:10) Judge Rushing ruled: "**Sustained.**" (Transcript at 224:11) Michael Halliwell responded: "I'm asking him about his decision making process, this is a discrimination case, and I don't understand how it could possibly be irrelevant [asking] how he is exercising his discretion." (Transcript at 224:12-15) Judge Rushing replied: "**I'm sustaining the objection.**" (Transcript at 224:16)

The broad scope of Judge Rushing's evasions and obstructionism in the course of trial proceedings makes this long-standing governing precedent highly relevant: "The purpose of the equal pro-

> tection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (*Sunday Lake Iron Co. v Wakefield Township* (1918) 247 U.S. 350, 352) (Id. at 17-18)

Appendix G (47:10-16) and our March 20, 2008 Motion for Reconsideration note how Charles Jensen's second attack on Defendants' right to a jury trial, caused Judge Rushing not to allow any opportunity for Defendants to rectify alleged format deficiencies in their proposed jury instructions. Appendix G (33:21 to 34:22) cites decisional (*Shelley v Kraemer* and *Mulkey v Reitman*) support which precluded even indirect state support for housing discrimination (and thereby overturned Proposition 14, which attempted to insert discrimination-friendly language into the California State Constitution in 1964), and quotes Judge Rushing's refusal to accept our proposed jury instructions based on these cases: "The document that you submitted is not – I mean, there are things in it that could be used as jury instructions, but that's – you're making me do a lot of work for you and that's not my job."

C. Postpone OEX Proceeding Set by Judge Boyd to Resume on April 21, 2009

Charles Jensen and Judge Rushing systematically undermined Defendants' opportunities to exercise their procedural rights, and conducted a shell game where crucial facts were kept out of the record. When this strategy ran into a road block, where Judge Rushing had no jurisdiction to act at all to enforce a $10,118 fees judgment, she resorted to operating off the record to turn over Defendants' assets to Charles Jensen. Charles Jensen's refusal to meet and confer totally destroyed the integrity of the discovery process, and until Defendants are "made whole" with respect to Jensen's discovery violations, Plaintiff's attorney should be barred from using judicial processes to gain access to Defendants' financial information, which he has abused in the past. Judge Boyd's OEX hearings became an ordeal for Defendants, because Judge Boyd's rulings on Defendant Halliwell's standing would not allow them to manage their own case. Judge Boyd's unsupported standing rulings created a need for many stops and starts of the proceedings (for example, when Defendants pointed out that Judge Boyd was demanding that James Parker comply with his unlawful orders).

8. Grounds for concern re unauthorized use of our financial information

James Parker's November 3, 2007 Claim of Exemption cites a key precedent:

> *In Ziello v Superior Court (1999) 75 Cal.App. 4th 651, 654 the Petitioner tried to do what Charles Jensen is trying to do here, and "Bank then obtained an ex parte order recalling and quashing the writ of execution." The petitioner then* ***unsuccessfully*** *asked the Court of Appeal "to allow petitioners to proceed with execution on the costs/fees portion of the judgment, the merits of which are contested in pending appeal by bank."* (CR-1088)

Charles Jensen's November 7, 2007 Opposition to James Parker's Claim of Exemption set a November 13, 2007 Hearing date (CR-1111), in spite of the fact that the form he used states: "A copy of the Notice of Opposition and the Notice of Hearing must be served on the judgment debtor and other claimant at least 10 days *before* the hearing." (CR-1112) Charles Jensen gave reasons for his opposition so superficial that he obviously was trying to conceal his grounds for opposition until the hearing, thereby defeating the purpose of the 10 days notice. His Notice said only: "**(1) CCP Sec 917.1, et seq, does not apply to JAMES PARKER (2) The cited case, ZIELLO v. SUPERIOR COURT (1999) 75 Cal.App. 4th 651 does not apply to Defendant JAMES PARKER.**" (CR-1112) (Appendix H **[26:1-17]**)

Defendants' November 15, 2007 Interrogatories to Charles Jensen protests:

> Defendant's October 29, 2007 Memorandum renews our protests about Charles Jensen's "procedural overload jamming tactics" and notes the family problems created by these tactics when Defendant Halliwell learned (on

> October 26, 2007) that he needed to make immediate arrangements to pay for his half of Charles Jensen's levy to enforce his $10,000 attorney's fees judgment. Charles Jensen's November 7, 2007 service on Defendants re a "Nov 13 2007 8:30 am hearing" was more of the same, inasmuch as his NOTICE OF OPPOSITION TO CLAIM OF EXEMPTION says on its face: "A Copy of this notice of Opposition and the Notice of Hearing must be served on the judgment debtor and other claimant at least 10 days before the hearing." However, Defendants "went the extra mile" and showed up for this illegal hearing as scheduled. However, when this hearing was cancelled (without prior notice) by Judge Rushing on account of a conflict with her other commitments, Defendants resisted a second illegal scheduling (Nov 14 2007 at 8:30 am) which conflicted with Defendant Halliwell's medical/political commitments that morning in Marin County. (CR-1175) (Appendix H **[26:18 to 27:2]**)

Defendants summarize key events at the Claim of Exemption Hearing:

When the rescheduled Claim of Exemption hearing took place on November 20, 2007, Charles Jensen cited no precedents to contradict the holding of *Ziello v Superior Court*, *supra*, and CCP Sec 917.1(d) that a motion consisting only of attorney's fees and other costs was not enforceable during the pendency of an appeal, without the appellant having to post an undertaking (appeal bond). It turned out that Charles Jensen's

ground for opposition was an attempt to do an end run around CRC 8.750(a) that requires Notices of Appeal to be liberally interpreted in favor of their sufficiency. In spite of James Parker's totally unambiguous support for Defendants' appeals from the $10,000 attorney's fees award, Charles Jensen was able to convince Judge Rushing that Defendants' appeal from the initial award of the $10,000 should be ignored, because it was vacated and reinstated after the appeal. This is a direct contradiction of *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997. Charles Jensen convinced Judge Rushing to disregard Defendants' appeal from the renewed award of the $10,000 on the ground that only Defendant Halliwell had signed it. This quibble is rejected in *Ehret v Ichioka* (1967) 247 Cal.App.2d 637, 640-641. (Appendix H **[28:2-19]**)

Defendants' analysis of events at the November 20, 2007 Hearing continues:

Judge Rushing then asserted her notion that there was really no appeal [which was only possible because of the protracted delay in considering these appeals by the Appellate Branch]. Thus Judge Rushing handed down her edict:

James Parker: "*The August 30th appeal does cover the $10,000 award of fees, and my name is on that appeal.*" (Transcript at 482:13-14)

Judge Rushing: "The order is September 25th." (Transcript at 482:15)

Charles Jensen: "**That is correct, Your Honor. And it's my understanding, and I believe I'm correct, that you can't file an appeal for**

anything that may conceivably happen at some time in the future." (Transcript at 482:16-19)

Judge Rushing: "Yes, I agree. So the Claim of Exemption is formally denied at this point." (Transcript at 482:20-21) (Appendix H **[29:10-19]**)

Defendants discuss the aftermath of the November 20, 2007 hearing:

To secure issuance of his October 2, 2007 Writ of Execution (CI 1730), Charles Jensen needed a copy of Judge Rushing's September 25, 2007 $10,000 fees award judgment. When he had the order copied, which Judge Rushing had signed and placed in the Case File, Charles Jensen must have noticed that there was no Proof of Service in the file (unlike Judge Rushing's prior order of September 5, 2007 (CI 1376-1377). Charles Jensen could have rectified this situation by serving a "notice of entry" of judgment himself, and started a 30 day clock running on the appeal of this order pursuant to CCP Sec 8.751(a)(2). However, this would have alerted the Defendants to his enforcement activity, so Charles Jensen left the 90 day appeal clock running (after entry of judgment for an unserved order), which had started on September 25, 2007. (Appendix H **[82:22 to 83:8]**)

Plaintiff's attorney never filed an Opposition challenging the fact that his (undisclosed until the November 20, 2007 hearing) ground for asserting that *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 655 did not apply to James

Parker, had been eliminated. Charles Jensen's failure to renew his Opposition also eliminated the possibility of any other ground. Defendants therefore assumed that their $10,188 was still in the Sheriff's holding account, until a remark by Charles Jensen at the Appellate Branch January 24, 2008 hearing caused them to suspect otherwise. (Appendix H **[83:10-14]**)

Defendants discuss what was actually going on in the case behind the scenes:

Because Judge Rushing took off for the long Thanksgiving Day weekend without doing anything about the frozen $10,118 in the Sheriff's holding account, Defendants "beat her to the Court House" by FIVE DAYS, before she turned her attention to this matter. By this time she had NO arguable basis for jurisdiction, but this DID NOT keep her from fulfilling her evident desire at the November 20, 2007 hearing. On November 26, 2007 she gave instructions to the Sheriff's Department, which caused Defendants' money to be turned over to Charles Jensen. (CR-2431) Of course, the Sheriff's Department has no access to court files, and assumed that Judge Rushing was acting within the scope of her authority. (Appendix H **[30:20 to 31:5]**)

All legal avenues had been closed by the court's loss of jurisdiction, for Judge Rushing to hand over Defendants' frozen assets to Charles Jensen. But then Judge Rushing simply switched to operating illegally off the record. It was extremely difficult to document how Judge Rushing acted off the record to turn over Defendants $10,118 to Charles Jensen. Charles Jensen was totally

evasive on this subject and declared in Appeals briefing "Respondent shall not respond to Appellants' [charges]." (Appendix H **[83:16-20]**)

Defendants describe how Judge Rushing concealed her $10,118 turnover:

Judge Rushing took advantage of "soft spots" in the system of justice which she was able to exploit. **1)** The Sheriff's Department does not forward a Claim of Exemption to court until an Opposition is filed; since Charles Jensen never filed an Opposition to Defendants' November 21, 2007 Claim of Exemption, Judge Rushing felt justified in ignoring a document (our Claim of Exemption which the Sheriff was holding onto) that was not in the files. But she certainly knew about it, according to the Sheriff's Department (as Defendants were told when the Sheriff finally agreed to "give up" the paperwork on this matter, six months after the events described here, and provided a November 21, 2007 Date-Stamped copy of the Claim of Exemption from their files). **2)** There is NO proof of service in the files for Judge Rushing's September 25, 2007 fees award to Charles Jensen, for the simple reason that this judgment was never served on the parties. Nevertheless, Judge Rushing inserted into her 11/07/2007 electronic docket entry describing the assignment of a reporter to the CLAIM OF EXEMPTION hearing and the date of hearing shown in Charles Jensen's 11/07/2007 Opposition, a false entry which states "NOTICE OF ENTRY OF JUDGMENT, SERVED 9/25/07" Had this been true, Defendants would not have been able to appeal Judge Rushing's September 25, 2007

$10,000 fees award, on November 21, 2007. Judge Rushing would have had a basis for claiming that James Parker had not signed an appeal from the $10,000 fees award (except that he did sign the appeal when the award was first made, which she chose to ignore). 3) Judge Rushing "sanitized" her 11/20/07 Courtroom Minutes (See Appendix H **[32:6 to 33:3]**) to avoid any mention at all of her grounds for ruling in Charles Jensen's favor on the Claim of Exemption. (Appendix H **[31:6 to 32:6]**)

The document effectuating the turnover of Defendants' frozen $10,118 is a copy of Judge Rushing's Courtroom Minutes of 11/20/2007, which says nothing about the basis for the court's ruling, and concludes with this operative sentence: "Upon conclusion of oral argument, Court orders the following: Court DENIES Claim of Exemption of Defendant James Parker." Judge Rushing has added her signature and this date: "11-26-07". It is stamped RECEIVED by the SONOMA COUNTY SHERIFF CIVIL BUREAU on "2007 NOV 26 3:17 PM" (Appendix H **[83:22** to 84:3])

9. Stonewalling Defendants' "standing" appeal and flouting CCP Sec 902

Defendants point out the basis for Michael Halliwell's standing on fees issues:

In fact, Michael Halliwell did NOT acquire standing by volunteering to pay half of James Parker's legal bills. Dr. Halliwell paid his $180 and became a Defendant in this case, because the only alternative was to be evicted automatically.

It is his major role in the eviction proceedings (which was the foundation for all the attorneys' fees being sought in this case) which gives him the "close relation" to his co-defendant that satisfies one of the three prongs of the *Powers v Ohio* (1991) 499 U.S. 400, 410-411 *jus tertii* standing test. It is putting it mildly to say that James Parker faces "some hindrance" in defending the conduct of legal proceedings managed by his co-Defendant. This satisfies another prong of the *Powers* standing test. It is undisputed that the cost sharing agreement between co-Defendants PRECEDES any fees award, and it is just as binding as any obligation to pay attorney's fees James Parker may be thought to have under the rental agreement. Michael Halliwell has already suffered a $5,059 "injury in fact" on account of the trial court's first fees award, and he faces a tripling of this burden if Judge Rushing's $20,720 fees award is ultimately upheld. Judge Rushing got it totally wrong when she shut a party, who meets all three of the *Powers* standing criteria, out of participation in the fees aspect of the case because "He doesn't have the right to this motion. He's a stranger." (Transcript at 475:18-19) (Appendix H **[66:11-22]**)

Defendants' November 21, 2008 filing says of Judge Rushing's standing ruling:

Michael Halliwell "seeks only the right to contest on the merits his automatic personal liability for fees which were originally sought and awarded solely against [someone else.]" Your Honors, that would be me. *Nelson v Adams* (2000) 529 U.S. 460, 472 authoritatively continues: "That right,

we hold, is just what due process affords him." Michael Halliwell has NO OTHER LEGAL WAY to avoid paying $10,360 in legal fees other than the reversal of Judge Rushing's May 6, 2008 fees award. Respondent's position here is the same as the rejected position of the Respondent in *Nelson v Adams* (at 464): "[Adams] did not explain why Nelson, once joined as a party, should not be permitted to state his side of that argument." (Appendix H **[76:3-9]**)

Appendix G (39:14 to 40:17) quotes the September 25, 2007 Hearing Transcript:

The [March 6, 2008] opinion summarizes Appellants' claim (2:13-14): "(10) the trial court stripped Michael Halliwell of standing with no legal foundation (regarding attorney fee issue)."

Judge Rushing cites no authority for not following Judge Nadler re standing:

> Under California law, if one is self-represented, a self represented person is the only one who may speak for himself or herself. Other persons may show up as support persons and give information and advice to the person but this is the exact same rule in every case. I'm not deviating from it, and so what I am going to say is if Mr. Parker would like to address the motion for attorney's fees, he may do so. (Transcript at 466:2-8)

Judge Rushing literally would not let Dr. Halliwell get a word in edgewise:

> Michael Halliwell: "Could I address this matter?" (Ibid. at 466:9)

Judge Rushing: "Excuse me. First, I'd appreciate you not interrupting me. I'm addressing this question to Mr. Parker. I'm saying, Mr. Parker, would you like to argue against the imposition of attorney's fees?" (Ibid. at 466:10-13)

James Parker: "I would, Your Honor, but not at this time. I'm not prepared. I did not think this was going to happen. My belief was that Mr. – Dr. Halliwell was going to be able to argue this." (Ibid. at 466:14-17)

Judge Rushing: "I don't understand why you would think this in light of – " (Ibid. at 466:18-19)

James Parker: "Because you vacated your tentative ruling." (Ibid. at 466:20)

Michael Halliwell: "Could I address it." (Ibid. at 466:21)

Judge Rushing: "No. I'm talking to Mr. Parker." (Ibid. at 466:22)

Judge Rushing again invokes unspecified legal authority:

Mr. Parker, you do not – when persons are self represented, the Court is under no obligation to teach them how to practice law or how to conduct their case. The statements I have just made are in the law library in all the practice books, and I'm inviting you, Mr. Parker, at this time if you wish to argue against the imposition of attorney's fees against you, to do so. (Ibid. at 466:22-28)

Judge Rushing then turned to Defendant Michael Halliwell and said: "And I am sorry, Mr. Halliwell, I'm not going to permit you to say anything in this argument at this hearing." (Ibid. at 466:28 to 467:2) Michael Halliwell responded: "Not even on the central issue on whether I should be allowed to speak?" (Ibid. at 467:3-4) Judge Rushing replied: "No, it's the same rule." (Ibid. at 467:5) Michael Halliwell continued: "Well, I believe Your Honor is mistaken. I object for the record." (Ibid. at 467:6-7) Judge Rushing terminated the discussion: "Mr. Halliwell, I've just made my ruling." (Ibid. at 467:8) (May 5, 2008 Supreme Court Appendix B at 4:3 to 5:13)

At the next fees hearing (on the day after Defendants cited this ruling in Appendix B), James Parker asked Judge Rushing: "Since the Court has never cited any case law as to why Michael Halliwell has not been allowed to speak, I would ask the Court to cite some case law as to why not." (May 6, 2008 Transcript at 5:10-12) Judge Rushing replied: "I'm not required to do so and I decline that request." (Ibid. at 5:13-14.)

Defendants discuss the basis for raising standing on appeal under CCP § 902:

There is no clearer proof that ineffective advocacy is what Sonoma County Superior Court judges are looking for, than the way in which unanimous governing precedents have been swept aside by Judge Chouteau and his colleagues, with respect to Defendant Michael Halliwell's status as an aggrieved party concerning the standing issue (who is therefore entitled to fully participate in the fees hearing). If there were any basis for

Judge Rushing's standing ruling, the Appellate Branch would surely have cited it in one of their orders upholding her attorney's fees rulings, since this has been the dominant determinant of fees proceedings below. *The correctness of a ruling below is something to be examined in the appeal process, not to be assumed from the outset.* (Appendix H **[105:8-14]**)

Defendant Halliwell's Reply Brief re May 27, 2008 Appeal (3:20 to 4:5) says:

Charles Jensen concedes that Defendant Michael Halliwell is adversely affected by any attorney fees award to Plaintiff (LNT 3:9-11), as he dismissively observes: "as they state ad nauseam throughout their papers they apparently have some sort of arrangement between them for Mr. Halliwell to pay ½ of the judgments and orders in this case." (Appendix H **[116:23 to 117:1]**)

Defendants discuss the significance of their cost sharing agreement:

Having fully satisfied the injury-in-fact requirement (because of Defendants' 50%-50% cost sharing arrangement, which antedated any standing challenge) and closeness of relationship requirement (having been evicted together) of *Singleton v Wulff* (1976) 428 U.S. 106, 112-113, the third requirement of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114, eliminated any basis at all for precluding Michael Halliwell's continuing to defend his own interest in the fees issue (exactly the same as James Parker's): "*The courts depend on effective advocacy, and therefore should prefer*

to construe legal rights only when the most effective advocates of those rights are before them." (CI 4647-4648) (Appendix H **[117:3-8]**)

10. Plaintiff's sabotage of discovery justifies imposing discovery sanction

Appendix G (58:3-12) quotes our December 7, 2007 Transcript Supplement:

The 60-Day Notice that laid the foundation for eviction said "THIS TERMINATION IS FOR CAUSE" and Defendants immediately initiated intensive efforts to secure the Report from the Homeowners' Association's March 26, 2007 Hearing, the Notice of which was attached to the 60-Day Notice. In our only conversation with Charles Jensen, he adamantly refused to address this (or any other subject), saying only "A landlord doesn't have to have or state a reason for eviction." (CR-1361)

Moreover, Charles Jensen completely and permanently severed all communication with Defendants after this April 12, 2007 conversation, thereby precluding compliance with this essential ingredient for any motion to compel discovery in CCP Sec 2016.040: "A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented in the motion." (CR-1361-1362)

Defendants explain the relief sought by their June 18, 2007 Application:

Since Charles Jensen opposed Defendants' first Ex Parte Application, he was obliged by Local

Rule 5.7D to "meet and confer" with Defendants, not merely show up with an Opposing Declaration filled with misleading statements. Therefore, on June 18, 2008 Defendants argued in their Application: "*Defendants are entitled to an order requiring Mr. Charles Jensen to 'meet and confer' with them to devise ways that this action can become a search for the truth, not an exercise in 'procedural war games.*" Defendants' Application of June 18, 2007 declares on its face sheet:

> *Michael Halliwell's accompanying Affidavit of June 17, 2007 documents aspects of recent events which demonstrate how Plaintiff's attorney is trying to obscure the true facts in the case. Plaintiff is using specious claims and highly questionable legal tactics to hide the weakness of Plaintiff's case, as well as to suppress Defendants' ability to adequately express the merits of theirs. The motion for a mandatory meet and confer conference (set forth below) before any dispositive action in the case can take place, seeks to remedy this situation.* (Appendix H **[12:23 to 13:12]**)

Appendix G (58:14 to 59:7) quotes #9 of California Attorney Guidelines of Civility and Professionalism, *Townsend v Superior Court* and *Greyhound Corp. v Superior Court* to show how Charles Jensen's evasion of discovery by severing communications, violated Business & Professions Code Sec 6068(d) who requires that members of the Bar "shall employ, for the purpose of maintaining

the causes confided to the member such means only as are consistent with truth."

11. Use of contempt of court threats and imposing contempt jail sentence

At the March 17, 2007 OEX Hearing, Judge Boyd said re the procedural situation:

There's three appeals the Court is aware of. Review has been denied in all three cases. And Mr. Parker had declined to answer the questions as these appeals were pending, and he felt it improper to be required to answer those questions while the appeal was pending on the chance that the appeal would overturn the judgment and, therefore, it would not be a valid judgment to be collected. (Transcript at 2:20-28)

James Parker answered Judge Boyd's inquiry re answering financial questions:

The first-and-most clear-cut reason why enforcement of the $20,720 fees judgment is still premature and the defendants have a right to appeal to the U.S. Supreme Court, and we intend to exercise that right. At the bottom of the first page of our March 12, 2009 letter to Chief Justice George is U.S. Supreme Court Rule 13.1, which provides 90 days after the denial of discretionary review for defendant to file a petition for certiorari in the U.S. Supreme Court.

The March 9, 2009 letter from a Senior Deputy Clerk of the California Supreme Court lists potential starting dates for this 90-day period. The earliest due date for our petition for certiorari is 90 days after January 21st, 2009. *If we file*

a petition consolidating our two adverse fees judgments, the deadlines for submission would be April 20th, 2009. If we file a separate petition for the $20,720 fees judgment, it would be due 28 days later, 90 days after February 18th, 2009, or May 18th, 2009.

OEX proceedings sooner than these filing deadlines would interfere with preparations of our petitions for certiorari. The earliest that the $20,720 judgment would be enforceable would not be until several months after these deadlines, if the U.S. Supreme Court declined to review our case. Therefore, Your Honor, we feel that these – this hearing is still premature. (Transcript at 3:19 to 4:18)

Charles Jensen answered Judge Boyd's inquiry re his position on further appeals:

Removal to the federal court requires that it be done in the beginning so that you preserve your right. The beginning of this case is now roughly a year and a half old. There are grounds if a removal or – of course not in front of the Court, so I won't get involved in the claims of federal rights. (Id. at 4:21-27)

Charles Jensen focuses on the 2nd ($20,720) fees judgment he is trying to collect:

And, as the Court recalls at the last hearing here, they said, "Well, because it's pending at the Supreme Court, we shouldn't go forward." The Court accepted that. The Supreme Court has ruled on it. That matter is dead. (Transcript at 5:5-10)

Charles Jensen supports a theory that a federal appeal is a year and a half too late:

What is at issue here is, has the state right of appeal, as expressed on the second judgment for Mr. Parker, been exhausted? It has been. We were continued to today's date because that State appeal was still pending as of the last hearing. The California Supreme Court ruled. It ruled. It has been denied. We are prepared to go forward. (Transcript at 5:15-21)

Judge Boyd ruled that enforcement is OK, if it takes place BEFORE an appeal:

All right. The Court – I've not read the materials just handed to the Court this time, the Court is not aware of any pending appeal or pending stays of the enforcement of the judgment. Therefore, the Court believes it appropriate now to proceed with enforcement.

THE INTENTION TO FILE AN APPEAL HAS NO BEARING UPON THIS COURT'S ABILITY OR THE APPROPRIATENESS OF THIS COURT, OF COURSE, HAVING TO GO AHEAD AND PROVIDE THE JUDGMENT. (Transcript at 5:22 to 6:3) (Appendix I ***5:4 to 6:12***)

CONCLUSION

This undiscussed "elephant in the room" explains Defendants' procedural ordeal. Defendants discuss Charles Jensen's evasions re Judge Rushings's CJP censure:

Our January 28, 2008 Notice to Presiding Judge Boyd re Circumvention of Their Claim of Exemption Without Any Opposition Being Filed or Any Recorded Judicial Authorization cites Judge Rushing's Censure for Dishonesty and Attempted Abuse of Authority: "When one Googles 'Judge Elaine Rushing judicial misconduct', one finds http://cjp.ca.gov/userfiles/file/Censures/Rushing_06-08-06.pdf which reports in Inquiry #177 a Decision and Order imposing public censure that provides the February 16, 2006 Notice of Formal Proceedings against Judge Rushing of the Commission on Judicial Performance. Appellants' January 28, 2008 Notice cited Judge Rushing's record of dishonesty and favoritism as described in the words of the Commission on Judicial Performance: "None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v Commission on Judicial Performance* (1989) 49 Cal 3d 826, 865 that honesty is a 'minimum qualification' expected of every judge." (CI 3152:19-21) AND "Judge Rushing then told Officer Holeman that in her courtroom she goes against court policies for CHP and other officers, and that he should extend the same courtesy to her. **She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate court justice.**" (CI 3151:12-14) Over two dissents from members who did not agree to the "plea bargain" arranged with Judge Rushing (for her to accept censure in exchange for dropping any further proceedings), the Commission explains its relatively light punishment: "There

was no on-bench misconduct and there was no direct adverse affect on the administration of justice per se." (CI 3153:6-7). It is obvious from Judge Rushing's evasive handling of her $10,000 fees award that she has not taken to heart the lesson she should have learned from having been caught trying to lie her way out of trouble in 2006. THERE IS NOW STRONG EVIDENCE OF ON-BENCH MISCONDUCT AND DIRECT ADVERSE IMPACT ON THE ADMINISTRATION OF JUSTICE PER SE BY JUDGE RUSHING. The question then arises as to why no response has been received by Appellants to their Notice to the Presiding Judge of the Sonoma County Superior Court, which documents this misconduct. The answer probably relates in some way to another observation made by the Commission on Judicial Performance: "Several people, primarily from the legal community have submitted letters in support of Judge Rushing remaining in judicial office." (CI 3153:7-8) If Charles Jensen has been sincere in his unstinting praise of Judge Rushing, he may well be one of the benefactors who helped to keep her on the bench. When this possibility was raised in Item #29 of Appellants' Opening Briefs, the only response by Charles Jensen was a caption which said: "**V. APPELLANT'S 29 IS INSULTING AND NO RESPONSE WILL BE TENDERED**" A disturbing possibility exists, which was pointed out to Presiding Judge Knoel Owen in Defendants' April 1, 2008 Petition (CI 3641:14-17) that the "kid's glove" treatment Judge Rushing's flagrant abuses of Due Process is getting from the Appellate Branch, is part of an effort to protect

her from further blemishes on her record (she has not faced the voters since her censure by the Commission on Judicial Performance, but is scheduled to do so in 2010). (CI 3153:20) (Appendix H **[93:16 to 94:17]**

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

First District
Court of Appeal
Division Two
Case # A124403

CALIFORNIA SUPREME COURT S171792

Sonoma County
Case # MCV 191306

Michael Halliwell, et al,
Petitioner vs.

FILED APR 6 2009
Clerk Supreme Court

Superior Court of
California, County of
Sonoma, Respondent;

Chrysanthe Paxinos,
Real Party in Interest

Defendants/Appellants'
Appendix re Review of the
Court of Appeal Denial of
Appellants' February 17,
2009 Petition for Mandamus
(and Subsequent Updates)

This Appendix consists of quotations from Appendices G and H (or references thereto) which set forth procedural grievances of enduring significance in the case. Taken collectively, these problems create a situation requiring a Writ of Supersedeas to "call time out" (during which time specific procedural remedies might be considered). Awareness of the background in this Appendix, will facilitate a better understanding of the issues raised in the accompanying main brief. Appendix G (12:16-22) quotes Defendants' summary of key issues:

> This case has been a pitched battle over fundamental procedural rights from the outset. Three early and middle-stage issues

are dominant: **A)** The Sonoma County Superior Court's policy of giving the earliest available trial date to the landlord when a request is filed (without allowing any opportunity for input by the tenant); **B)** The use of perjury by Plaintiff's attorney with regard to his service of documents (thereby eliminating discovery by further distorting the case timeline) and the lack of opportunity for Defendants to present their evidence that key documents were NEVER served and certainly not placed in the Case File until long after their current date stamps suggest that they were filed; **C)** Allowing the use at trial of an anonymous compilation of second and third hand hearsay complaints at trial (instead of answers to Form Interrogatories 71.7 and 77.1, which Defendants had repeatedly tried to secure). (Defendants' Petition (S163276) seeking review re March 6, 2008 Decision at 2)

Dated this 3rd day of April, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

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1. February 25, 2009 & March 24, 2009 action re Defendants' stay motion

The issue in Plaintiff's "two front squeeze" maneuvers is preparation time denial.

Jennings v Superior Court (1967) 66 Cal 2d 867, 875-876 cites key precedents:

> "While the determination of whether in any given case a continuance should be granted 'normally rests in the discretion of the trial court' (*People v Buckowski* (1951) 37 Cal 2d 629, 631, that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. 'That counsel for a defendant has a right to reasonable opportunity to prepare for trial is as fundamental as is the right to counsel.' (*People v Sarazzawski* (1945) 27 Cal 2d 7, 17; accord, *Cooper v Superior Court* (1961) 55 Cal 2d 291, 302.) It is also as fundamental as the defendant's right to be advised of the charges against him, for the latter right is illusory if he then is denied sufficient time to prepare to meet such charges. (See *In re Hess* (1955) 45 Cal 2d 171, 175, and cases cited.)" (*People v Murphy* (1963) 59 Cal 2d 818, 825) (Id. at 2:2-9)

Defendants' March 23, 2009 Update quotes our February 1, 2009 Petition, saying:

International Shoe Co. v Washington (1945) 326 U.S. 316, 319, discusses the scope of Fourteenth Amendment limitations on State legal procedures: "Whether due process is satisfied must depend, rather, upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process*

clause to insure."

World-Wide Volkswagen Corp. v Woodson (1980) 444 U.S. 286, 292, affirms that federal Due Process review ensures that a State procedural rule "does not offend traditional notions of fair play and substantial justice." (*International Shoe Co. v Washington* (1945) 326 U.S. 316, 326, quoting *Milliken v Meyer* (1940) 311 U.S. 457, 463.)

Elkins v Superior Court (Contra Costa County) (2007) 41 Cal 4th 1337, 1365 held:

> Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. [Citations.] Accordingly, decisions about whether to grant a continuance or extend discovery "must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency." (*Hernandez v Superior Court* (2004) 115 Cal.App.4th 1242, 1246) (CR-1479 to 1480)

In *World-Wide Volkswagen Corp. v Woodson* (1980) 444 U.S. 286, 291, the U.S. Supreme Court resolved a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States, by invoking the due Process Clause of the Fourteenth Amendment, to overrule the Oklahoma High Court: "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v Neff* (1878) 95 U.S. 714, 732-733. (Appendix I ***11:2-25***)

Appellants' February 17, 2009 Mandamus Petition (S170538) cites more abuses:

Interspersed with Judge Rushing's repeated interruptions, as Defendants tried to read their jurisdictional motion, was a discussion of Defendants' "second line of defense" (an equitable argument that we deserved a postponement because so much of the briefing period for the $19,000 fees motion was improperly taken up by OEX proceedings). This was based on Judge Robert S. Boyd's January 20, 2009 ruling wiping out the effects of OEX proceedings, which Judge Boyd determined to have been conducted prematurely: "So now that I am beginning to get a clearer picture of the whole story, not just this Court's role, which was the enforcement of the judgment, I believe that the Court was premature in the finding of contempt. At this time, I am going to vacate the finding of contempt, as that matter of enforcement on the $20,000 is on appeal."

Since Judge Rushing felt that Judge Boyd's Order of January 20, 2009 was a mistake, she brushed aside this equitable argument. When she rejected Defendants' jurisdictional challenge, Judge Rushing did so without explanation. Without skipping a beat, Judge Rushing went from her ruling that she did in fact have jurisdiction, to affirm her unexplained Tentative Ruling to grant Plaintiff's motion for attorney's fees in the amount of $19,000. There is no way that such a process of consideration can be considered a "meaningful hearing at a meaningful time" within the meaning of *Mathews v Eldridge* (1976) 424 U.S. 319, 333 and *Armstrong v Manzo* (1965) 380 U.S. 545, 552. (Id. at 30-31)

2. Piling fees upon fees starts with judicially unreviewable $4,000 demand

Appendix G (19:15-21) discusses events after the

first fees hearing rescheduling:

After Judge Rushing granted a motion by Defendant Michael Halliwell for a continuance of the July 31, 2007 date she had set for a hearing on the fees motion (because of problems of mail notification to Defendants of the hearing date), Defendants tried unsuccessfully to secure from Plaintiff's attorney the endorsed filed copy (of their original "unfiled" fees motion or any revision in response to Defendants' July 16, 2007 submission) they had been promised by Kadin Blonski. However, when Defendants invoked Local Rule 18.8 (on August 15, 2007 with an e-mail entitled "where's your brief?"), Kadin Blonski responded by insisting that no filing with a proper face sheet was necessary. On August 22, 2008 James Parker sent a 52-page opposition (CR-374 to CR-425) to an award of ANY fees to Plaintiff's counsel, which evoked his refusal to accept any further electronic service (on the ground that "paper is not cheap.") For the next several weeks after James Parker filed his 52-page Opposition, whose length is acknowledged (CR-457) in an e-mail from Kadin Blonksi, Charles Jensen and Judge Rushing apparently agreed to pretend that James Parker's Opposition did not exist. See details quoted from originally rejected Supreme Court Appendices in Appendix G (36:10 to 37:25)

Defendants question Judge Rushing's good faith in issuing her Tentative Ruling:

When Charles Jensen refused to respond to the charges in James Parker's August 22, 2007 Opposition to ANY fees award (because Plaintiff's counsel was employing dishonest and illegal subterfuges), Judge Rushing [called off the scheduled fees hearing]

Judge Rushing's Order of September 5, 2007 (CR-599) claims to have "inadvertently failed to notice that it had previously stated that no tentative ruling would be issued and that appearances would be required for the hearing on plaintiff's Motion for Attorneys Fees." Michael Halliwell's Affidavit of September 25, 2007 comments on this claim:

> Judge Rushing said when she vacated her Tentative Ruling that she "inadvertently" overlooked that she had informed the parties that there would be no tentative ruling in the case. This inadvertence was deliberate since Judge Rushing certainly saw that Charles Jensen and the Defendants both showed up on August 28, 2007 expecting a hearing to take place. (We were in the front row and had announced our presence to the clerk in Courtroom 19.) Judge Rushing rearranged the order of the cases posted outside the courtroom that day, so that she called them one by one [and] all the cases listed after MCV 191306 were completed, before she called a recess and swiftly left the court-room. When I stood up and clearly said "Your Honor," the bailiff demanded that I immediately go out into the hallway. I informed the bailiff that Judge Rushing's own order said that mandatory appearances would be required, and offered to show him the order. The bailiff went back and checked with Judge Rushing, and returned with an order that we leave the premises at once or be arrested. (CR 707 to CR-708)

Viewed in this context it is clear that when Rushing was forced to vacate her Tentative Ruling because it was flatly contradictory to Local Rule 2.2D, the

following provision in her Order of September 5, 2007 was simply another device to find a way to rule without allowing any input from Defendants: "No further papers of any kind will be permitted to be filed on this motion prior to the next hearing date of September 25, 2007." This order only bars filings *prior* to the hearing, not when the parties were before the court, but Judge Rushing would not allow the filing of the Affidavit quoted above, or any of the other documents which Defendants submitted to rectify the false claim (relating to Plaintiff's motion for attorney's fees) in the vacated Tentative Ruling that "Defendant Parker did not oppose the motion." (CR-465) (Appendix H **[67:6 to 68:2]**)

Defendants discuss the aftermath of the August 28, 2007 Tentative Ruling:

On August 30, 2007 Charles Jensen mailed to Defendants and presented in person to Judge Rushing's Judicial Assistant a proposed order, implementing Judge Rushing's Tentative Ruling awarding him $10,000 in attorney's fees. (Appendix H **[19:7-10]**)

Attachment #3 is Charles Jensen's Proposed Judgment After Motion, which attempts to implement Judge Rushing's Tentative Ruling, by presenting this proposal directly to Judge Rushing's judicial assistant on August 30, 2007, and mailing it to Defendants, so that they would be unable to react until court opened after the Labor Day Holiday on September 4, 2007 (see Appellants' April 18 Petition at 10:14 to 11:19). Charles Jensen knew that the basis for this Tentative Ruling was false (and indeed, *in a motion to be heard by Judge Rushing on May 6, 2008, he is asking for $493 for reading James*

Parker's August 22, 2007 Opposition to the $10,000 fees award, which he claimed in his Judgment After Motion did not exist). (Appendix H **[68:4-9**)

After parroting Judge Rushing's false statement in her August 28, 2007 Tentative Ruling ("Defendant JAMES PARKER did not oppose the motion.") in his Proposed Judgment After Motion (CI 1462), Charles Jensen shifts ground in his October 27, 2008 Reply Brief (LNT 7:23-24), saying: "James Parker did not file an official opposition to the Motion for Attorney's Fees." This quibble about the wording on the face-sheet caption of James Parker's August 22, 2007 opposition (CI 1066-1117) might have been relevant only if mislabeling had caused Judge Rushing to overlook James Parker's filing. However, James Parker reminded Judge Rushing of his August 22, 2007 opposition on August 28, 2007 (CI 1240). By clinging tenaciously to an alleged "labeling defect" in James Parker's oppose-tion as grounds for granting Charles Jensen's fees motion, Judge Rushing flouted the mandate of *City of Shasta Lake v County of Shasta* (1999) 75 Cal.App.4th 1, 11: "The law aspires to respect substance over nomenclature." (Appendix H **[68:10-18]**)

Appellants note (May 5, 2008 Supreme Court Appendix B at 16:17-23):

James Parker protested having to present oral argument without warning:

> Well, I would take exception, Your Honor, to this because at this point I feel I'm being railroaded here. I'm sorry, but it's fair to give me the opportunity. I had no idea I was going to have to be here and give oral argument, and I cannot

> speak extemporaneously on this and serve myself well at all or serve myself period, Your Honor. So please, give me the opportunity. I will only ask one more time for an extension on this so that – this is $10,000. You know, to me, Your Honor – that may not be much to you but it's very much to me, and I would like the opportunity, if I'm forced to address the Court solely by myself on this, to be given the opportunity to – to prepare, at least something that I can read, you know. Give me a few weeks to do this, Your Honor, please. (Transcript at 473:24 to 474:9) (Appendix G (39:5-13))

Michael Halliwell affirms in Item #6 of his Affidavit of September 25, 2007:

> Every single word which Defendants filed on the specifics of Charles Jensen's fees requests was disallowed by Judge Rushing, as was everything either Michael Halliwell or James Parker submitted or tried to submit on Charles Jensen's right to any fees at all under the rental agreement in the case. She never justified her award of any fees at all or the $10,000 she reasserted from her vacated tentative order (whose only justification in that tentative order was an alleged lack of opposition from the Defendants). It is clear that Judge Rushing is not merely trying to reach the result she desires, regardless of intervening factual and legal obstacles, she is also trying to preclude any effective appellate review of her lines of reasoning, by keeping Defen-dants' side of the pivotal issues out of the record. (CR-708:13-17) (Appendix H [24:16-23])

Appendix H [107:13 to 108:11] cites a key issue evaded by the Appellate Branch:

Neither the order of October 7, 2008, nor the transcript of the September 25, 2008 hearing, says why: "Appellants fail to demonstrate any reversible error." The Appellate Branch totally ignores these points raised in briefing, which show that Plaintiff is not entitled to any fees at all:

The Plaintiff started out with a contract claim, and tried to secure a verdict by Judge Nadler on that basis with a June 19, 2007 no-notice motion for summary judgment (in violation of CCP Sec 1170.7). But Judge Nadler never ruled on this motion and Charles Jensen never renewed it before Judge Rushing, as Judge Nadler suggested he might (probably because Charles Jensen no longer had the element of surprise). *Xuerab v Marcus & Millichap, Inc.* (1992) 3 Cal. App.4th 1338, 1341-1342 ruled out this sort of "bait and switch" method of securing fees because "although the buyers initially sued for breach of contract, they did not go to trial on that basis." Moreover, *Exxess Electronixx v Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708, citing numerous passages in *Santisas v Goodin* (1998) 17 Cal 4th 599, affirms that "*the question of whether to award attorney's fees turns on the language of the contractual provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision.*"

James Parker's supposedly non-existent Opposition (at CR-416) points out why Charles Jensen was entitled to NO fees at all, because Jensen explicitly stated that his theory of the case was NOT seeking to prove cause, i.e. a violation of the rental agreement, "because the code section says no cause is

needed" (see June 25, 2007 transcript at 172:25 to 173:3). Parker cites *Walters v Marler* (1978) 83 Cal.App.3d 1, 27-28 quoting *McKenzie v Kaiser-Aetna* (1976) 55 Cal.App.3d 84, 89-90 rejecting the idea that the Legislature in enacting Civil Code sec 1717 meant to include "all provisions in the contract allowing for attorney's fees, whether or not those fees are incurred to enforce the provisions of the contract." It states that the only reasonable interpretation of section 1717 is "the allowance of attorney's fees only when such fees are incurred to enforce the provisions of the contract." Parker's August 22nd Memorandum points out: "The jury has found NO breach of contract and the contractual language (clause #13 in the rental contract allows attorney's fees only 'to enforce any part of this agreement.')"

Appendix H **[117:10 to 118:4]** adds reasons why no lawyer's fees should be paid:

James Parker's reasoning on the need for a party to show a contract violation to invoke a contractual provision for attorney's fees was directly supported by *Santisas v Goodin* (1998) 17 Cal.4th 599 at 602, 608-609, 617, 619. This governing precedent holds that "the question of whether to award attorney's fees turns on the language of the contractual attorneys' fees provision" and "whether the type of claim is within the scope of the provision." Judge Rushing cut James Parker off at this point, saying: "Okay. Mr. Parker, would you have a seat please." James Parker replied: "Well, I still have these other issues to address." Judge Rushing continued: "Okay, but there's a 20-minute limit on law and motion and we have exceeded that. If you have just a quick wrap up you can do that." (Transcript at 15:19-25)

Judge Rushing's imposition of a 20-minute limit in these circumstances violated *Schweiger v Superior Court* (1970) 3 Cal 3d 507, 514 which holds: "Certainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the 'tail wagging the dog.'"

Appellants' April 18, 2008 Petition (at 8:19 to 9:6) discusses how Charles Jensen refused to accept the $375 specified by Local Rule 2.2E for the prevailing party in a normal court trial (*he demanded an UNREVIEWABLE $4,000* even though, when faced with Judge Nadler's refusal to allow a jury trial because the address of the property was put in the wrong place on Defendants' form UD-150, Defendants were willing to voluntarily leave the property). For fighting against this $4,000 unreviewable fees award for giving up, Defendants were eventually saddled with $10,000 in fees by Judge Rushing, even though *Santisas v Goodin* (1998) 17 Cal 4th 599, 614 states: "We are satisfied that concern for the efficient and equitable administration of justice requires that the parties be left to bear their own attorney's fees." *International Industries v Olen* (1978) 21 Cal 3d 218, 224-225 explains: "*The purpose of litigation is to resolve participant's disputes, not compensate participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees.*")

3. Due Process right to unobstructed preparation of our federal appeals

Appellants' February 17, 2009 Mandamus Petition (S170538) discusses appeals:

At the February 10, 2009 Fees Hearing, Judge Rushing expressed the view that Judge Boyd was wrong to have suspended OEX proceedings, and that the discretionary review part of the appeals process involved no rights for an Appellant. Therefore, her trial court need not make any accommodation to protect an Appellants' optional rights. The February 10, 2009 Fees Hearing started off with a protracted battle occasioned by Judge Rushing's insistence that even a motion (attached) premised on a court's alleged lack of jurisdiction had to be placed on the Law & Motion Calendar in the usual fashion, in order to receive consideration. In fact, a court should NEVER act without jurisdiction, and such a challenge is always timely (when it is supported by the facts of the case). Defendants' "Motion re Lack of Jurisdiction" was based on their December 22, 2008 Notice of Appeal (wherein all transcripts have been prepared and paid for, but a briefing schedule has not yet been set). The focus of this appeal is Judge Rushing's insistence on ignoring the mandate of *Gray v Justice's Court* (1937) 18 Cal.App.2d 420, 423, which affirms: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.*" There was no indication that Judge Rushing would be willing to conduct the February 10, 2009 fees hearing, in accordance with *Gray v Justice's Court*, and she was in fact unwilling to do so. Accordingly, the hearing was an aspect of the case related to a pending appeal, and Judge Rushing had no authority to act at all in this matter. Thus *Varian Medical Systems, Inc. v Delfino* (2005) 35 Cal 4th 180, 190 notes: "if the possible outcomes on appeal and the

actual or possible results of the proceeding are irreconcilable . . . *that proceeding must be stayed under section 916, subdivision (a).*" (Id. at 29-30)

Defendants cite a key precedent which rejects Plaintiff's squeeze tactic:

The deliberate "jamming" of Defendants by the manipulation of various briefing schedules to create at "two front" squeeze, was as clear a sign of bias, and as clear a basis for vacating the judgment resulting from a denial of adequate preparation time, as in *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1289: "The judge's comments that he could 'jam' Gamet and that he wanted to 'keep the heat on,' when combined with the unexplained judgment dismissing the action shortly thereafter, seemed arbitrary and created the appearance of substantial unfairness." Plaintiff's counsel does not deny that this "two front" situation was deliberately created, only claiming "**we're under no obligation to time our motions to go along with whatever they have going on.**" Attorneys' other court commitments certainly ARE considered for purposes of hearing scheduling, why not the conflicting scheduling demands IN THE SAME CASE, for self represented litigants? (Appendix H **[114:11-18]**)

Defendants analyze the repeated scheduling problems in the case:

Since litigants in *pro per* must learn the law as they go along, it is very difficult for them to "keep their heads above water" when they are forced to fight a two (or three) front war. The scheduling of a $20,000-plus attorney's motion so that its briefing and hearing (March 25, 2008 to May 6, 2008)

overlapped the filing deadlines for higher court review of their July 24, 2007 appeal of pre-trial and trial issues and briefing on Judge Rushing's off-the record transfer of $10,118 of Defendants' funds to Charles Jensen. *This confluence of deadlines did not have to occur.* **a)** It took until November 5, 2007 for a briefing order to be issued for Defendants' July 24, 2007 appeal.[1] **b)** The listing in the Chronological Index for the 1/14/2008 briefing order which originally set a June 26, 2008 hearing date for Defendants' November 21, 2007 Appeal has the correct date, but it also lists this order as "Notice of Time and Place for Filing Griefs." (Appendix H **[86:21 to 87:3]**)

This briefing was aborted on account of a dispute over a missing Chronological Index, noted in Judge Chouteau's order of February 5, 2008 (CI 03412). It took until May 13, 2008 to get the Chronological Index updated and briefing reinstated. (For some reason this briefing order is not included in a later edition of the Chronological Index up through 8/29/08.) **c)** Judge Chouteau took no action for more than two months on Defendants' February 4, 2007 "Petition to Presiding Judge Knoel Owen re No-Notice Change in Policy Allowing Copies of Filings of in Record Designations" (CI 03198), which had been referred to him. (The Court Clerks would not say who they meant by "the judges don't like it" with respect to disallowing the use of CR numbering by Defendants, but Supervising Judge of the Civil Division Elaine Rushing bears responsibility for this decision, and her file manipulation was the reason why Defendants felt obliged to institute their CR numbering.) On April 18, 2008 Judge Chouteau signed an order saying: "Appellants Petition re

Notice Change is denied." (CI 03991) However, this order was not filed and served on the parties until May 23, 2008. **d)** On April 30, 2008, in full compliance with everything the window clerks asked of them, Defendants filed their "Petition to Presiding Judge Knoel Owen to Postpone May 6, 2008 Hearing on Attorneys Fees." The window clerks informed Defendants to check Box 73 in the Hall of Justice for a response. They checked Box 73 repeatedly up until the May 6, 2008 hearing was upon them, but no action was apparently taken on this motion. (Appendix H **[87:4-16]**)

Defendants reminded Presiding Judge Owen in an October 14, 2008 petition:

With various deadlines impinging on them from different directions, Defendants are in no position to try to untangle what is going on behind to scenes to disadvantage them in their efforts to compile an appropriate record of the factual and legal aspects of this case. When one considers the palpable evasiveness in the orders issued by Judges Rushing and Chouteau in this matter and the No Process of Law which is available at their hearings, *it is hard to see how a reasonable person aware of the facts in this matter would conclude that the required (by judicial ethics canons 1 and 2A) "appearance of impartiality" has been maintained by the Sonoma County Superior Court.* In addition to the other duties of a Presiding Judge, CRC 10.603(c)(4)(A)(i) provides: "The presiding judge must notify the Commission on Judicial Performance of a judge's substantial failure to perform judicial duties." *Presumably this mandate implies the authority to keep the appearance of*

improper favoritism from growing to even larger proportions in the case at bar, by taking necessary corrective action. (Appendix H **[90:12-20]**)

4. Violation of fair notice and opportunity to be heard Due Process rights

Judge Nadler set the stage for Judge Rushing's consideration of the case. Appendix G (42:13 to 45:24) quotes the Transcript of Pre-trial Proceedings before Judge Nadler, which describe how Judge Nadler originally denied Defendants demand for a jury trial on the basis of a misplaced address of the property. These Transcript quotes also show how Judge Nadler curtailed Defendants' opportunity to submit suggestions for jury instructions, when he granted Defendants' motion to restore a jury trial.

Appendix G (66:16 to 67:22) and the January 24, 2008 Appeal Transcript quote our defense of the Unruh Act (arbitrary discrimination) aspect of our case, which cited *Shelley v Kraemer*, *Mulkey v Reitman*, *In re Cox*, *Marina Point v Wolfson* and *Koebke v Bernardo Heights Country Club*. Appendix G (32:14 to 33:19) quotes an exchange between Defendant Michael Halliwell and Plaintiff's counsel Charles Jensen, re the scope of protection against arbitrary discrimination from the Transcript of Pre-

trial Proceedings before Judge Nadler. Defendants' main point was that "equality and enjoyment of property rights was regarded by the Fourteenth Amendment as an essential pre-condition to the realization of the other basic civil rights and liberties which the amendment was intended to guarantee." Plaintiff's main argument was that "*Marina v Wolfson* has to do with discrimination of children, period." Charles Jensen argued: "To quote *Wolfson* for other than that is to intentionally and knowingly mislead the Court." See Appendix G (67:23 to 69:5) for documentation of how tenants were treated as second class citizens, by their exclusion from Homeowners' Association dispute resolution hearings. Judge Rushing left anti-discrimination law totally out of jury instructions.

Reitman v Mulkey (1967) 387 U.S. 369, 371 invalidated Prop 14, which said:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." *Reitman v Mulkey* (1967) 387 U.S. 369, 377 rejected Prop 14 on federal grounds because: "The right to discriminate, including the

right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. *Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.*" *Reitman v Mulkey* (1967) 387 U.S. 369, 381 discussed the prohibited intent of Prop 14: "The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned." *Romer v Evans* (1996) 517 U.S. 620, 633 affirms that equality requires impartiality: "*Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.*"(Appendix H **[51:1-15]**)

Defendants' November 26, 2007 Transcript Appendix cites our key issue:

There is no basis in law for a blanket exclusion of tenants from dispute resolution proceedings where homeowners have full rights of participation (simply because the governing board of the Meadow Pines Homeowners' Association is elected only by homeowners). The right to petition for redress of grievances is so fundamental that no State has the authority to adopt legislation governing which inhibits its free exercise, and in fact California has adopted statutory protection for this right, as

Defendants have noted (CR-190). This statute (CCP 425.16(a) explicitly seeks to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." Moreover, this statute decrees that "this participation should not be chilled through the abuse of the judicial process. To this end, this section shall be construed broadly." Thus Judge Rushing's handling of this matter violated *S.P. Growers Assn. v Rodriguez* (1972) 17 Cal 3d 719, 730, which states: "A landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason: here, retaliation for the tenant's efforts to vindicate an important statutory right." (CR-1235-1236) (Appendix H **[52:20 to 53:6]**)

Judge Rushing totally refused to adjudicate this fundamental grievance:

Judge Rushing may have felt she had authority, as a matter of state law, to make her court into an indirect enforcer of the discrimination against tenants in the complaint evaluation policy of the Meadow Pines Homeowner's Association. However, state law CANNOT justify enforcement of such a restrictive covenant in the face of FEDERAL protection against arbitrary discrimination. In the course of invalidating such a course of action six decades ago, the U.S. Supreme Court ruled in *Shelley v Kraemer* (1948) 334 U.S. 1, 20: "*The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.*"

(Appendix H [53:7-14])

Appendix G (14:12 to 15:18) cites Defendant Michael Halliwell's affirmative defense in his Answer to Plaintiff's complaint: ("It is clearly arbitrary discrimination in rentals to exclude someone because he knows something about his legal rights, and is willing to help a co-tenant in his legal battle. The three-day notice is clearly and plainly an attempt to use retaliatory eviction to intimidate Mr. Halliwell.") After quoting Defendant Halliwell's arguments against Charles Jensen's No-Notice Motion for Summary Judgment (in violation of the 5-day notice required by CCP Sec 1170.7), based mainly on AB 1400 which gave a statutory basis to anti-discrimination dicta in cases before 2006, we note that Charles Jensen abandoned this motion after Judge Nadler declined to rule in his favor. Charles Jensen subsequently abandoned any effort to show cause – see Appendix G (21:3-14) – and Judge Rushing refused to allow the jury to rule on the validity of the 3-Day (subtenancy) Notice. Appendix G (15:19 to 16:20) notes that landlord Gus Paxinos never tried to enforce the 3-Day Notice seeking to exclude Defendant Michael Halliwell and

quotes the Trial Transcript, which shows how Judge Rushing completely excluded information about allowing Defendant Halliwell to stay or not stay. Further quotation of the Trial Transcript shows how Judge Rushing "poisoned the well" with respect to any arbitrary discrimination in trying to banish Defendant Halliwell from the premises with a supplemental instructions saying "You cannot consider the parties' hidden intentions."

Appendix G (11:11 to 12:2) and our January 24, 2008 Appeal Transcript Appendix quote *Hall v Superior Court*, *Schweiger v Superior Court* and *Au-Yang v Barton*, which emphasize the importance of doing substantial justice against applying rules in such a way which obstructs a determination on the merits. Appendix G (57:10 to 58:2) quotes Defendants' November 13, 2007 Analysis of Judge Nadler's Proceedings, to show how Judge Nadler gave priority to "the summary nature of these proceedings" over the "the interest of doing substantial justice" (and thereby violating the mandate of *Schweiger v Superior Court*).

Defendants' latest Update reminds the First District Court of Appeal that rights given

unequivocal support in decisional law, still need enforcement to be a living reality.

> The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. (*Abelleira v District Court of Appeal* (1941) 17 Cal 2d 280, 293) (Id. at 5)

5. Lack of recourse from Plaintiff's perjury and flouting of Local Rules

Appendix H **[48:12-22]** cites a June 26, 2007 discussion as the jury convened:

The key service of process aspect of costs was discussed with Judge Rushing:

> Defendant Michael Halliwell responded: "I had a motion to show that they engaged in perjury in the process of getting this case started, and that operated to deprive me of any discovery by this manipulation of the time line." (Transcript at 443:3-6) When she commented on this issue, Judge Rushing said: "Such things as requests for finding Mr. Jensen, for example, guilty of perjury or some things that have to do with the service of process, I ruled that those, either they're irrele-

vant, inadmissible in this trial or, per timing, it's too late." (Transcript at 446:21-25) Judge Rushing added: "In the Court's view, the defendants were trying to go backwards. My job is to move the case forward." (Transcript at 447:1-2)

Judge Rushing seemed to miss the point that **Defendants were only trying to get back to where Judge Nadler had left this issue. Judge Nadler told the parties: "I'm not making any findings right now, I haven't made any findings about service, whether it was proper or not, I don't want you to have that impression."** (Transcript at 14:2-5)

Appendix G (47:18 to 48:2) and our March 20, 2008 Motion for Reconsideration note how defective service by Plaintiff became the basis for Defendants' motion seeking to restore the 10 days of crucial preparation time, which they were deprived of by Plaintiff's false service claims – see Appendix G (26:16 to 27:10). Appendix G (48:4-23) and the January 24, 2008 Appeal Transcript quote discussion of how Judge Rushing refused to address the falsified service issue (which Judge Nadler had deferred ruling on) and show how evasions relating to the filing of Plaintiff's $10,000 fees motion prevented a fair consideration of this motion. Appendix G (51:22 to 54:14) and our March 20, 2008 Motion for Recon-

sideration cite documentation of perjury relating to service of the original summons and Plaintiff's request for trial date setting and contrast Judge Rushing's evasions on this subject with Judge Nadler's willingness to address this issue on the merits.

Appendix G (55:16-23) and our March 20, 2008 Motion for Reconsideration analyze the holding of *Dial 800 v Fesbinder* (2004) 118 Cal.App.4th 32, 52 to show that Defendants' motion seeking a ten day postponement of any exercise of the court's jurisdiction, DID NOT support the notion that seeking to remedy the effects of Plaintiff's falsified service, had the effect of curing defects in service. Appendix G (16:22 to 17:14) quotes *Pease v City of San Diego* ("The ground stated was the defendant city was not properly before the court and obviously the city did not intend thereby to appear generally.") and confirming language from *Brock v Fouchy* and *Frohman v Bonelli* to show that treating Defendants' submissions to Judge Nadler as a general appearance "would emasculate the statute." Thus, Defendants explained the "no win' situation which they faced:

> The main activity during Judge Nadler's pre-trial proceedings in the case was Defendants' efforts to

limit the court to its **proper** jurisdiction, under the sloppy (and dishonest) form of notification used by Plaintiff, whereby they should have been allowed 15 days of preparation time before the landlord could avail himself of the expedited consideration features of California's Unlawful Detainer law. If Defendants had not gone to court to challenge the sloppy and dishonest form of notification used by Plaintiff, they would have allowed only 5 days of preparation time.

6. Manipulation of appeal scheduling to obstruct evaluation of merits

Defendants' October 29, 2007 Memo cites a vital issue re status of Case File:

Defendants were concerned that it would be some time before their appeal from Judge Rushing's denial of a meaningful hearing at a meaningful time would be considered by the Appellate Branch, and that in the interim they might be subjected to the conesquences of this denial of Due Process. *The denial of Due Process which took place on September 25th is made worse by problems with the Case File which Defendants discovered on October 17, 2007. That is: the entirety of Volume #2 of the Case File (which deals with the give-and-take between the parties on the Attorney Fees issue) has "gone missing," and the folders in the Case File have been renumbered to pretend that the original Volume #2 never existed (see Exhibit V-1).* (CR-1068) (Appendix H **[23:5-11]**)

Exhibit V-1 is a photocopy of the outside of a Case File folder made by Deputy Clerk Dave Sharp on 10/22/07 with receipt of that date superimposed. The SECRET stamped on the folder is a reminder of what may happen, when Justice Brandeis'

prescription for integrity in official proceedings "sunlight is the best disinfectant" is subordinated to other considerations. (Appendix H **[77:16-21]**)

The issue of file tampering is certainly an "issue of substantial public interest, which is capable of repetition, yet evades review" and so should be adjudicated BEFORE Defendants are financially punished for trying to bring this matter to the attention of higher courts. (See *In re Natasha A.* (1996) 42 Cal.App.4th 28, 38 and cases cited therein.) (Appendix H **[96:6-9]**)

Defendants discuss problems relating to overlapping briefing schedules:

Exhibit P sets forth a chronology whereby consideration of Defendants' $10,118 fees appeal is delayed to the point where a "two front war" is created with Defendant's May 27, 2008 appeal from a $20,720 fees award. This cavalcade of judicial and clerical "procedural war games" starts with Judge Chouteau "pulling the plug" on briefing slated by a January 14, 2008 order in his order of February 5, 2008. This order cites a clerical mistake relating to the chronological index, but Defendants had provided sequentially numbered duplicate copies of all filings which they argued should have been used to allow briefing to go forward. It took until May 13, 2008 for this "clerical mistake" to be rectified so that briefing could get underway. The real reason for this long delay may be embodied in Judge Chouteau's Order promulgated on April 18, 2008, but not filed until May 23, 2008. This order simply states: "Appellant's Petition re No-Notice Change is denied." What it means is that serially numbered duplicate copies will no longer be accepted as part of a designation of

record on appeal. Dispensing with serially numbered duplicate copies eliminated protection against the file tampering, which had devastating consequences at the outset of the case. This also made it much more cumbersome to refer to prior filings, until the "get everything done in 20 days" period for preparation of Opening Briefs started. With similar obstructionist effect, Judge Chouteau waits three months before ruling on January 22, 2008 petitions for separate hearings on appeals (so that appropriate supporting case material is available for each appeal) and another month before filing this order on May 23, 2008. This order totally avoids the underlying issue and proclaims that the issue of separate hearings "is moot" and Appellant's petition "is denied on that basis." Judge Chouteau also had no enthusiasm for dealing with our motion which sought to resolve inconsistencies which were disrupting the appeals process, and he ignored this motion (relating to broken promises concerning the handling of the fees issue manifest in the Order of March 6, 2008) until he could declare it "denied by operation of law on April 5, 2008, pursuant to CRC 8.708." (Appendix H **[87:18 to 88:10]**)

Defendants cite a key precedent applicable to separate appeal hearings:

The viability of grievances said to be moot (as Judge Chouteau proclaimed in his Order of May 23, 2008 with respect to Defendants' motions for non-overlapping consideration of appeals), are as strongly supported under the Federal version of "capable of repetition, yet evading review" (*Moore v Ogilvie* (1969) 394 U.S. 814, 816) as in California State law. (Appendix H **[94:19-22]**)

Appendix H **[60:16 to 61:9]** analyzes the holdings of *Housing Authority of Monterey County v Jones* (2005) 130 Cal.App.4th 1029 re the impact of pre-appeal involvements on the propriety of a judge's participating on an Appeal Panel. Appendix H **[61:10 to 62:9]** continues:

Defendants do not challenge Judge Hardcastle's appeal participation on *Jones* grounds. However, Defendants feel a far stronger *Jones* disqualification case can be made against Judge Chouteau's continued participation in the Appeal Panel, after his many rulings on procedural issues which ensnared our later appeals.

Is it a coincidence that Judge Chouteau issued his Orders of May 23, 2008, two days before the deadline for input from Respondent in Appellants first appeal to the California Supreme Court? The subject matter of these orders was apparently decided upon many weeks before the orders were filed. They all relate to questionable aspects of the handling of the attorney fees issue. The first motion disposed of cited inconsistencies between the policy recognized in Judge Chouteau's Order of February 5, 2008 regarding the essential ingredients (transcripts and chronological index) required before a proper briefing process can commence. It noted the absence of the September 25, 2007 hearing transcript (Order of March 6, 2008 at 1:25-27), and the fact that the Order of March 6, 2008 (at 4:2-11) purported to affirm a fees award made on September 25, 2007 (which itself is entirely unexplained). This happened in spite of seeming assurances to contrary (made at the January 24, 2008

hearing and cited at 3:2-8 of the analysis of that transcript, which is included in Defendants' May 27, 2008 Notice of Appeal). Lacking the courage to squarely address this matter, Judge Chouteau wrote in his order on this subject, that Defendants' motion "was denied by operation of law on April 5, 2008, pursuant to CRC 8.708." The second motion dealt with a change in policy, under which Defendants had been allowed to file serially numbered duplicate copies of all filings in the case, as part of their designation of the record on appeal, to protect against the sort of ex post facto insertions (of a Plaintiff's Proof of Service and Form UD-150, CR-129 & 130, CR-131) which had been absent from the file from June 11, 2007 through June 21, 2007 (as noted in filings at CR-026, CR-054, CR-063, CR-073 and CR-088) as if they had been filed on June 6, 2007. Without saying what issue is involved, Judge Chouteau's order simply says, "Appellant's Petition re No-Notice Change is denied." The third motion sought separate hearings where the violations of Local Rules 2.2D (August 29, 2007 Appeal), the use of a September 5, 2007 filing ban to preclude rectifying an alleged lack of opposition to Plaintiff's fees motion (which was granted on September 25, 2007 and appealed the next day) and file tampering (October 17, 2007 Appeal), could be effectively scrutinized. Judge Chouteau's order was not issued in a timely fashion, and when it was filed it too late for effective recourse Defendants learned that that the Appellate Branch had ruled "Appellant's Petition for Separate Hearings is moot and is denied on that basis."

Defendants cited the appellate duties of a Superior Court Presiding Judge:

In terms of broad implications for all of Defendants' appeals, and in view of the fact that no action has ever been taken on it, the need for a separate hearing was greatest for Defendants' October 17, 2007 File Integrity appeal. An accurate record should be available for every appeal, and seeing that records are not being tampered with, is certainly an important duty of the Presiding Judge of a Superior Court. (Appendix H **[35:9-15]**)

Defendants' October 14, 2008 Petition to Presiding Judge Knoel Owen notes:

It is among the duties of a County Superior Court Presiding Judge to ensure the timely preparation of records on appeal, as provided in CRC 10.603(c)(10), and this still remains to be properly done A WHOLE YEAR AFTER JUDGE RUSHING'S PROCEDURAL OUTRAGE. CRC 10.603(d) provides: "The presiding judge remains responsible for all duties listed in this rule even if he or she has delegated them to someone else." (Appendix H **[93:9-14]**)

Defendants' October 14, 2008 Petition to Presiding Judge Knoel Owen observes:

When Defendants were able to "get their heads above water" with respect to documenting and explaining their pre-trial and trial grievances, they filed a protest of this consolidation of their appeals with the Presiding Judge of Sonoma County Superior Court. *Since CRC 10.603(c)(10) assigns responsibility for "ensuring the timely preparation of records on appeal" to the Presiding Judge of the Superior Court, including responsibility "to facilitate prompt completion of transcripts," this Petition (CI 3011-3053) was appropriately directed.* The relief requested in this

Petition is noted on its Face Sheet (CI 3011):

> Because the transcripts for hearings dealing with the attorney's fees aspects of this case became available to the parties so late (January 14, 2008 via Box 170 to Respondent's attorney; January 15, 2008 via U.S. mail to Defendants) there has been only the most superficial briefing (about 1 ½ pages) on the appeals dealing with this subject (which were noticed on August 29, 2007; September 26, 2007 and October 17, 2007). Instead of having the subject matter of these appeals "spill over" into Defendants' appeal noticed on November 21, 2007 and slated for hearing on June 26, 2008 (whose January 14, 2008 Notice of Time & Place for Filing of Briefs was obviously triggered by the availability of the September 25, 2007 and November 20, 2007 fees-related transcripts), Appellants propose that separate hearings be scheduled on March 27, 2008; April 28, 2008 and May 22, 2008 for each of these virtually unbriefed appeals. (Id. at 5:23 to 6:11). (Appendix H **[92:18 to 93:7]**)

7. Judge Rushing's evasions she seeks to protect from effective review

Appellants' February 17, 2009 Mandamus Petition (S170538) observes:

Judge Rushing's invocation of California's "vexatious litigant" law (CCP § 391) seeks to brand as frivolous, several of the 28 specific grievances whose supporting evidence and caselaw is set forth in the Appendix to this Petition. During proceedings where Judge Rushing issued the rulings that she claims are being frivolously challenged, she never cited any supporting authority, and rarely gave any explanation of her

rulings. The main basis for Judge Rushing's February 9, 2009 Order to Show Cause, is set forth therein at 3:23-28:

> Specifically, the filing of numerous Appellate and Supreme Court actions constitutes repeated "attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." CCP Sec 391(b)(2).

This was written before Judge Rushing took the bench for her Fees Hearing at 8:30 AM on February 10, 2009, and it clearly reflects her view that a ruling by the Appellate Branch of a Superior Court is a final determination of a limited jurisdiction (less than $25,000 maximum award) case. In Judge Rushing's view, any attempt to seek review by a court that is not obliged to take the case is, *ipso facto*, frivolous. This concept implies that the Plaintiff in *Elkins v Superior Court of Contra Costa County* (2007) 41 Cal 4th 1337, should have given up after the Court of Appeal summarily denied his challenge to procedures that were strongly (and apparently unanimously) supported by the Contra Costa Superior Court. Such a broad definition of "frivolous" is untenable, and Judge Rushing's Order to Show Cause should be permanently stayed, without prejudice to its renewal, if and when the Sonoma County Superior Court rulings being challenged by Defendants have been shown to be

consistent with governing precedents and consistent with proven facts in the case. (Id. at 31-32)

Appendix G (65:17 to 66:14) and our March 20, 2008 Motion for Reconsideration quote the Trial Transcript to document the pivotal role in deciding the case played by the anonymous compilation of hearsay complaints in Plaintiff's Exhibit #5. Appendix G (31:3 to 32:12) gives the text of Defendants' "Motion to Strike No-Notice Anonymous Evidence" and quotes some of Judge Rushing's exclusionary rulings from the Trial Transcript, which she used to shield Exhibit #5 from critical analysis (after it was admitted in spite of Defendants' motion).

Appendix G (34:23 to 36:8) quotes some of Judge Rushing's exclusionary rulings from the Trial Transcript, which she used to used to keep the jury from considering evidence of the improper motivation, mostly on the basis that "his actions taken since the notice are irrelevant." This contention is explicitly rejected by Civil Code Sec 1942.5, which lists other benchmarks later than the Notice to Quit – see Appendix G (69:7 to 70:15), where to burden of proving a non-retaliatory motive rests on the

landlord). Appendix G (70:21 to 72:12) quotes the Trial Transcript to show how Judge Rushing refused to allow James Parker to testify about how he was prevented from bringing his side of disputes relating to rules enforcement into Homeowner Association proceedings and how Judge Rushing misused Evidence Code Sec 352 to preclude discussion of most of the contents of Exhibit #5.

Appendix G (78:14 to 79:5) cites the evasion of key issues throughout the case:

Except for two opening sentences invoking the fact that the Appellate Branch had indeed ruled in Respondent's favor, here (in his March 26, 2008 Opposition to Defendants' Motion to Reconsider the Order of March 6, 2008) is the entirety of the ONLY response to ANY of Defendants' motions for reconsideration or rehearing (or petitions to higher courts) that Charles Jensen has ever made:

> *The purported 'Request for Reconsideration; herein is cobbled together with excerpts from the internet (irrelevant), misquoted legalisms (irreverent), and the Defendants' own conclusion as to it's impact (meaningless). Between the trial of June 2007, and the appellate arguments of January 2008, these Defendants filed and served, more than 2900 pages of whimsy, dribble and nonsense. Nowhere were there, or are there, cohesive legal thinking and conclusions based on law and the facts of this case. This, as all other "pleadings," are without merit, and it is respectfully requested that this "motion" be denied.*

No Judge has ever asked Charles Jensen to back up his scornful claim.

At the May 6, 2008 hearing James Parker protested to Judge Rushing: "But the point here is he's never – he's never controverted with law any of the citations that we have – that we've briefed him on. All he said is they're dribble [Jensen's exact word], nonsense and whimsy; so I would like to ask the Court to ask him what percentage of those citations that were issued – what fraction are whimsy, dribble and nonsense?" Judge Rushing replied: "Okay, Mr. Parker, I'm not going to ask that question." James Parker continued: "One last thing, then. Okay. I would like to ask one more question. Can he now cite any one citation that's whimsy, dribble and nonsense?" Judge Rushing replied: "I'm not going to force him to do that." James Parker then complained: "Defendants take exception to that because all he's – essentially all his argument is it's all garbage. He's never controverted a single one of our citations, and they are scholarly, and they're well documented." (Transcript at 17:9-24) (Supreme Court Appendix E at 12)

8. Grounds for concern re unauthorized use of our financial information

Defendants' November 15, 2007 Interrogatory #1 to Charles Jensen states:

Plaintiff's Opposition consists ONLY of the bare assertion that the attached bank account is "not exempt under the statutes relied upon in the Claim of Exemption" because "(1) CCP Section 917.1, et seq, does not apply to Defendant JAMES PARKER and (2) The cited case ZIELLO v. SUPERIOR COURT (1999) 75 Cal. App.4th, 651, does not apply to JAMES PARKER." Attached is the Notification of

Defendants' first appeal from the $10,000 fees judgment which says: "YOU AND EACH OF YOU will please take notice that appellant(s) Michael Halliwell, James Parker filed a Notice of Appeal in the above-entitled action on August 29, 2007, at the Superior Court of California, County of Sonoma, and hereby appeals to the Appellate Division, Superior Court of California, County of Sonoma." Also attached is Notification of "DEFENDANTS' September 26, 2007 NOTICE OF APPEAL Renewed after Judge Elaine Rushing Concludes Trial Court Proceedings with Her $10,000 Fees Award of September 26, 2007." *This deliberately obscure language is an obvious attempt to divulge your actual reasoning only at the hearing on your Opposition. What are you talking about?* (CR-1176) (Appendix H **[27:3-13]**)

Defendants' November 19, 2007 Opposition to Seizure of [their] $10,118 says:

Charles Jensen is continuing his policy of cutting procedural corners to try to gain unfair advantages. This time he tried unsuccessfully to force a hearing in violation of this requirement clearly printed on his NOTICE OF OPPOSITION TO CLAIM OF EXEMPTION: *"A copy of this Notice of Opposition and Notice of Hearing must be served on the judgment debtor and other claimant at least 10 days before the hearing."* Charles Jensen is *still* trying to defeat the purpose of allowing 10 days for the study of his Opposition by Defendants, with an extremely vague and superficial statement of the grounds for his opposition, which consists entirely of the unexplained claim that the relevant statute (CCP Section 917.1, et seq) and the governing precedent (ZIELLO v. SUPERIOR COURT (1999) 75 Cal.App.4th 651) "does

not apply to Defendant JAMES PARKER." (CR 1183) (Appendix H **[27:14-22]**)

Defendants cite two key "justice friendly" Code of Civil Procedure provisions:

Defendants invoked the power of the Court to consider amendments to filings, pursuant to CCP Sec 703.580(a) "in the interest of justice." This avoided requiring a court which is faced by insufficient pleadings, pursuant to CCP Sec 703.580(c), to "order the hearing continued for the production of other evidence, oral or documentary." It cannot be a mere coincidence that the 10 days allowed for claimants to prepare after the filing of Opposition to their claim of exemption is the same as the 10 days allowed for a Reply brief in normal appellate proceedings under CRC 8.706. ANY FLING THAT A COURT HAS THE POWER TO ACCEPT "IN THE INTEREST OF JUSTICE" AND IN THE ABSENCE OF WHICH IS REQUIRED "TO ORDER THE HEARING CONTINUED" TO SECURE SUPPLEMENTAL INFORMATION, CAN CERTAINLY BE VOLUNTARILY PROVIDED BY A PARTY IN ADVANCE, IN ORDER TO EXPEDITE PROCEEDINGS. (Appendix B in S163276 at 29) (Appendix H **[81:20 to 82:2]**)

Judge Rushing resolutely swept aside any consideration of fundamental justice:

After refusing to allow Defendant Halliwell to cite governing precedents and documented facts which established his standing to contest a fees award which stood to cost him just as much as it would cost James Parker, Judge Rushing also shut down the other Defendant in this exchange:

James Parker: "*You may have continued it [to allow*

for ten days preparation time], but that doesn't mean he didn't act improperly. Also, in his opposition, he stated no argument. He just stated that he was opposed to it. Defendant has a right to know what the argument is ten days in advance of any hearing so that he can supply a written opposition to whatever the – Mr. Jensen's argument is." (Transcript at 481:11-18)

Judge Rushing: "Wrong. Wrong, sir. Wrong. I just told you the only pleadings on a claim of exemption are the claim of exemption and the opposition and that's it." (Transcript at 481:19-21) (Appendix H **[28:23 to 29:9]**)

In setting aside CCP Sec 703.580(a), which allows amendments "in the interest of justice" and CCP Sec 703.580(c), which allows "production of other evidence, oral or documentary" in Exemption Claim proceedings, Judge Rushing herself was "wrong, wrong, wrong." (Appendix H **[82:13-15]**)

Appendix H **[75:18-25]** cites a key precedent, rejecting judicial high-handedness:

> Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without a hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly and deliberate method by which matters

> are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence where the truth lies, application of the appropriate laws to the facts found, and a rendition of a judgment accordingly. (*Estate of Buchman* (1954) 123 Cal.App.2d 546, 560)

Appendix H **[121:5-15]** cites protection against judicial arbitrary action:

For reading Defendants' Memorandum on Procedural Rights of Pro Per Litigants, Charles Jensen was awarded $893 by Judge Rushing. Charles Jensen never found a flaw in any of our citations, including *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1283, which describes the antithesis of Judge Rushing's style of case management:

> The trial court's discretion is not absolute: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Bailey v Taaffe* (1866) 29 Cal 422, 424.) An exercise of discretion is subject to reversal on appeal where no reasonable basis for the action is shown. (*Common Cause v Stirling* (1983) 147 Cal.App.3d 518, 522.) (CR-755:22 to CR-756:2)

Defendants cite a historic case of abuse of discretion by a County Sheriff:

A judge unconstrained by the Rule of Law, who invokes a Sheriff's power in a totally non-accountable fashion, can do even more to undermine respect for the fairness of law enforcement than the Sheriff of San Francisco who ran amuck in *Yick Wo v Hopkins* (1886) 118 U. S. 356, 366-367. In that opinion the U.S. Supreme Court, sternly rebuked the California judiciary of that day, and those who implemented state laws in its name, saying: "*We are constrained, at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question. . .... The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.*" *Yick Wo v Hopkins* (1886) 118 U. S. 356, 373-374 continues in this vein: "*In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. .... Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.*" (Appendix H **[84:4-15]**)

Defendants cite governing precedents dealing with fraudulent judgments: Judge Chouteau's way of dealing with fraud was to hide behind deadlines. *People v Malveaux* (1996) 50 Cal.App.4th 1425, 1434 affirms a vital concept:

> The United States Supreme Court has recognized the courts have an inherent ability to correct judgments obtained through fraud or intentional misrepresentation. (Hazel-Atlas Glass Co. v. Hartford-Empire Co. (1944) 322 U.S. 238, 248.)

In *Hazel-Atlas Glass Co. v Hartford-Empire Co.* (1944) 322 U.S. 238 the U.S. Supreme Court was divided only with respect to whether the trial court or the Circuit Court of Appeal should rectify the fraud. Thus, Justice Roberts observes:

> No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. (322 U.S. at 251)

Hazel-Atlas Glass Co. v Hartford-Empire Co. (1944) 322 U.S. 238, 246 states:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. (Appendix H **[112:11-25]**)

9. Stonewalling Defendants' "standing" appeal and flouting CCP Sec 902

Defendants cite the legal basis for their equal standing re attorney's fees:

Judge Rushing brushed aside federal governing *jus tertii* precedents (such as *Powers v Ohio* (1991) 499

U.S. 400, 410-411 and *Singleton v Wulff* (1976) 428 U.S. 106, 112-116, which would have allowed Michael Halliwell to defend against his indirect injury (arising from any fees obligation falling on James Parker as a result of their having been evicted together), even if both Defendants were not still parties in *Paxinos v Halliwell & Parker*. However, she went beyond this to vitiate Defendants' right of self representation affirmed in *Faretta v California* (1967) 422 U.S. 806, 812-813 and the mandate of *Gray v Justice's Court* (1937) 18 Cal. App.2d 420, 423: "*regardless of legal requirements for the privilege of practicing law, 'the right of one to appear and conduct his own case is not affected.*" (Appendix H **[66:23 to 67:4]**)

The bedrock governing precedent which forms the basis for judicial review of all violations of Constitutional rights makes clear, as *Baker v Carr* (1962) 369 U.S. 186, 208 reaffirms by citing it, "*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.*" (*Marbury v. Madison* (1803) 5 U.S. 137, 163). It is simply untenable to suppose that, the indirect injuries ruled cognizable in *Powers v Ohio* (1991) 499 U.S. 400, 410-411, in *Singleton v Wulff* (1976) 428 U.S. 106, 112-116, and in *Craig v Boren* (1976) 429 U.S. 190, 195 are any more linked to the Plaintiff's interests there, than the burden of legal fees in *Paxinos v Halliwell & Parker* is to Defendant Halliwell's interests. (Appendix H **[74:3-9]**)

Fuentes v Shevin (1972) 407 U.S. 67, 80 affirms a fundamental legal principle: "For more than a century, the central meaning of procedural due

process has been clear: '*Parties whose rights are to be affected are entitled to be heard.*' Baldwin v Hale (1863) 68 U.S. 223, 233. See Windsor v. McVeigh (1876) 93 U.S. 274; Hovey v. Elliott (1897) 167 U.S. 409; Grannis v. Ordean (1914) 234 U.S. 385. . . . . The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions." (Appendix H **[76:10-14]**)

Defendants analyze governing precedents squarely applicable to their standing:

In *Powers v Ohio* (1991) 499 U.S. 400, 410-411 the U.S. Supreme Court set out a succinct three pronged test which must be satisfied to assert *jus tertii* standing:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *Singleton v Wulff* (1976) 428 U.S. 106, 112; the litigant must have a close relation to the third party, *Singleton* 428 U.S. at 113-114; and there must exist some hindrance to the third party's ability to protect his or her own interests. 428 U.S. at 115-116. See also *Craig v Boren* (1976) 429 U.S. 190.

The *Powers* Court explains its ruling in support of *jus tertii* standing:

> Both the excluded juror and the criminal defendant [Powers] have a common interest in eliminating racial discrimination from the courtroom.... This congruence of interests makes it necessary

> and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venireperson's rights. (499 U.S. at 413-414.) (Appendix H **[103:18 to 104:6]**)

The fact that half of the burden of any fees award in *Paxinos v Halliwell & Parker* falls automatically on Defendant Michael Halliwell, is the reason he has standing to try to prevent this adverse consequence. The United States Supreme Court squarely rejects Respondent's effort to divorce standing from potential injury. Thus *Baker v Carr* (1962) 369 U.S. 186, 204 gives this bedrock definition of standing: "*Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.*" Defendants not only alleged an equal personal stake in the fees issue for both Defendants, they documented their two-way cost sharing arrangement. (Appendix H **[104:7-13]**)

Defendants cite caselaw re indirect injuries as the basis for standing:

Respondent's effort to deny standing just because Defendant Halliwell is indirectly damaged by an award against Defendant Parker, is squarely rejected by *Warth v Seldin* (1975) 422 U.S. 490, 504, which affirms: "The fact that harm to petitioners may have resulted indirectly does not, by itself, preclude standing." In trying to force Defendants to "change horses in the middle of the stream" with

respect to aspects of the case for which Defendant Halliwell had primary responsibility, Charles Jensen and Judge Rushing are clearly attempting to force ineffective advocacy of Defendants' position on the fees issue. This is a direct violation of the mandate of *Singleton v Wulff* (1976) 428 U.S. 106, 113-114: "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." (Appendix H **[101:25 to 102:7]**)

Defendants discuss the underlying grievance Judge Chouteau Judge is evading:

Chouteau's no-notice change in the degree to which he was willing to allow Defendants to minimize the overlapping of their briefs, constituted a hindrance (within the use of this term in the third prong of the *Powers v Ohio* (1991) 499 U.S. 400, 410-411 *jus tertii* standing criteria) to Defendant Parker to present his case effectively. (Appendix H **[40:23-25]**)

Defendants cite a clearly applicable binding precedent re standing on appeal:

The Order of November 17, 2008 does not provide any justification for the Appeal Panel's refusal to allow the standing issue to be argued in accordance with the clear mandate of *Conservatorship of Stewart* (1969) 276 Cal.App.2d 211, 215 (cited in support of rehearing):

> The respondent urges us to dismiss the appeal, arguing that, since the order did not and could not, affect Omansky's rights as against either Mr. Stewart or The Bank of California, he is not a "person aggrieved" with the meaning of section 902 of the Code of civil procedure. But the order

> dismissed him as an objector. We that that, although Omansky was not an authorized objector, he had, and has, a right to have his status determined. . . . In other words, a party is "aggrieved" by an order, within the meaning of section 902, even though his grievance turns out to be legally without merit. (Appendix H **[113:16-23]**)

Appendix H criticizes Judge Chouteau's flouting of CCP Sec 902 **[39:25 to 40:6]**:

The main focus at the September 25, 2008 Hearing was supposed to be the complex maneuvers which allowed Defendants' frozen $10,118 to be turned over to Charles Jensen. However, Judge Chouteau prevented Defendants from conducting our case as we planned, by abandoning his policy (at the January 24, 2008 Appeal Hearing) of allowing Defendants to choose which of them presented their case to the Court. Appendix H continues **[100:20 to 101:22]**:

The notion that Defendant Halliwell cannot appeal Judge Rushing's ruling denying him standing is squarely rejected in *20th Century Insurance Co. v Choong* (2000) 79 Cal.App. 4th 1274, 1277. The *Choong* opinion says: "Because Drum is obliged to reimburse Collins for the sanction if it is upheld on appeal, Drum's 'rights or interests are injuriously affected' by the sanction order and his interest is 'immediate, pecuniary and substantial.'" Furthermore, *In re Catherine H* (2002) 102 Cal.App.4th 1284, 1294 is completely unambiguous on the right to appeal a trial court's denial of standing: "Even if [Appellant] did not have standing below, she would still be aggrieved by the trial court's ruling that she did not have standing. Thus, she would still have standing to appeal." (The opinion cites Code of Civil

Procedure, Section 902 & *Conservatorship of Stewart* (1969) 276 Cal.App. 2d 211, 215.) *In re Catherine H* concludes: "Any other approach would improperly conflate standing to appeal with the merits."

Also, *Aries Development Co. v Coastline Coastal Zone Conservation Commission* (1975) 48 Cal.App.3d 534, 542 specifically notes that the right to appeal directly accrues from a trial court's ruling that a party lacks standing with respect to a motion. The *Aries* opinion cites *Koehn v State Board of Equalization* (1950) 50 Cal 2d 432, 435 which affirms: "The policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law, the 'right of appeal is remedial, and in doubtful cases the doubts should be resolved in favor of the right whenever substantial interests of a party are affected by the judgment.'" [The opinion cites three other supporting cases.]

Also, in addition, *United Investors Life Insurance Co. v Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303-1304 cites *County of Alameda v Carleson* (1971) 5 Cal 3d 730, 736 and numerous other authorities in support of its holding that "an appellate court has *jurisdiction* to determine whether a party has standing in prior proceedings. Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure Section 902."

Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal 4th 180, 198-199 notes:

> Because "the remedy by appeal *cannot be denied* to an aggrieved party dissatisfied with the

> judgment or the order appealed from by an act of the trial court in the action, at the behest or on the motion of the respondent, after an appeal has been taken and is pending" (*Durbrow v. Chesley* (1913) 23 Cal.App. 627, 629, italics added), the automatic stay under section 916 *must* divest the trial court of fundamental jurisdiction over the matters embraced in or affected by the appeal (see *Mulvey v. Superior Court* (1913) 22 Cal.App. 514, 516 ["'Common fairness and a sense of justice readily suggests that while plaintiffs were in good faith prosecuting their appeals, they should be in some manner protected in having the subject matter of the litigation preserved intact until the appellate court could settle the controversy'"]). Indeed, the only way to ensure that the appealing party has a remedy on appeal is to deprive the trial court of jurisdiction in its fundamental sense.

10. Plaintiff's sabotage of discovery justifies imposing discovery sanction

Appendix G (59:21 to 60:10) quotes Defendants' protests re File Integrity: **Fraudulent service combined with file tampering left Defendants helpless:** Defendant's June 17, 2007 Affidavit cites Plaintiff's tactics to block discovery:

> **It would be difficult to imagine a case where the right (in mandatory Form UD-150) to make a COUNTER-REQUEST relating to the setting of a trial date is more important than in MCV 191306 as handled by Plaintiff's attorney Charles Jensen.**

Surprise, Surprise! This document is also missing from the case file (see Complete Listing of Documents in File – except Defendants' filings, as of June 11, 2007 at approximately 10:00 AM)... Defendant should have some input relating to jury-nonjury, estimated length of time the trial will take, and dates of non-availability and reasons therefore – before a suggestion based on *minimizing* the opposing party's opportunity to prepare, is placed on the calendar.

On Friday afternoon June 8, 2007 an *Order & Notice of Trial Unlawful Detainer* in CHRYSANTHE E. PAXINOS vs. MICHAEL J. HALLIWELL, ET AL arrived at Defendants' address (postmarked June 7, 2007). This Notice said a trial had been set for June 19, 2007 at 8:30 AM. If somehow Michael J Halliwell reacted with lightning speed and got off an interrogatory seeking the name of the anonymous complainer mentioned in the February 20, 2007 Notice of a March 26, 2007 hearing attached to Plaintiff's March 30, 2007 Complaint, it would have arrived in Monday's (June 11, 2007) mail at Mr. Charles Jensen's office. He might have waited until his response deadline on June 16, 2007 and not answered at all (since discovery closed on June 14, 2007). He might have said he didn't know, or he might have actually supplied the name of the person who complained about Mr. Parker's "threatening behavior." It wouldn't have made any difference as it was too late for

any follow-up. (CR 74-75)

Appendix G (46:1 to 47:7) and our March 20, 2008 Motion for Reconsideration discuss how Judge Nadler's violation of Local Rule 4.10H(1) and Charles Jensen's flouting of Local Rule 5.7D combined to deprive Defendants of vital procedural rights, and cite *Fairmont v Superior Court* and *Beverly Hospital v Superior Court*, which favored restoration of Defendants' discovery rights in these circumstances. Appendix G (60:11 to 61:9) shows how *Fairmont* and *Beverly Hospital* supported Defendants' right to secure answers to Form Interrogatories 71.7 & 77.1 before the trial went forward (after its original date was disrupted by PLAINTIFF'S frivolous challenge to Defendants' right to a jury trial).

Defendants' March 27, 2009 Update re March 24, 2009 *Hagan* Remand states:

While *Hagan* has been given much broader applicability, its own case circumstances have an important tie-in to *Paxinos v Halliwell & Parker*. *Hagan* notes: "The basic purpose of pretrial discovery, of which the taking of depositions is a part, is to expedite pending litigation (*Greyhound Corp. v. Superior Court* (1961) 56 Cal 2d 355)." (57 Cal 2d at 770) Appendix G (29:22-25) notes: "On **July 26, 2007**, Charles Jensen asserted that 'counsel was

under no obligation to educate the defendants in counsel's tactics at trial.' In fact, *Greyhound Corp. v Superior Court* (1961) 56 Cal 2d 355, 376 and *Chronicle Pub. Co. v Superior Court* (1960) 54 Cal 2d 548, 561, proclaim that legislatively mandated legal procedures are intended to do away 'with the sporting theory of litigation – namely, surprise at the trial.' Moreover, it was Charles Jensen's false claims with respect to service which allowed him to manipulate the time line to avoid providing the answers required in Form Interrogatories 71.7 & 77.1."

James Parker sums up with Justice Brandeis' famous statement on concealment:

"Sunlight is the best disinfectant," a well-known quote from U.S. Supreme Court Justice Louis Brandeis, refers to the benefits of openness and transparency. [It is as applicable in contemporary life as ever.] If questions from constituents, the public, or the media make leaders or other responsible parties obfuscate, the questions are usually valid and the answers are not. People who feel uncomfortable under the bright light of scrutiny and criticism often have something to hide. (CR-666:4-7) (Appendix H **[74:11-15]**)

11. Use of contempt of court threats and imposing contempt jail sentence

Defendants' March 27, 2009 Appendix re March 24, 2009 *Hagan* remand states:

The whole concept of an "off the record" direct contempt finding is corrosive to the rule of law. Judge Boyd obviously felt a great urgency in sending James Parker to jail. This is manifest in his converting our March 20, 2009 motion to vacate (or at least stay) his

Contempt of Court jail sentence, into an Ex Parte Application. When the key March 17, 2009 Transcript becomes available, it will show that Defendants had no reason to anticipate such an evasive handling of their motion. Judge Boyd's refusal to say anything at all about his reason for denying our motion, and his refusal to speak at all to Defendant (who sat patiently in Courtroom 21 for the two hours it took His Honor to complete other business), sucked all substance out of Judge Boyd's commitment to "consider" what Defendants stayed up all night preparing. Judge Boyd should have made arrangements for a court reporter without a backlog of criminal case transcripts to prepare (which delayed writing up of her notes for our March 17, 2009 hearing), if he intended to move with such speed. **Off-the-record justice in matters of personal liberty, is simply NOT justice.** (Appendix I ***3:23 to 4:5***)

Appellants' March 19, 2009 S170538 Update re Third Front Situation says (at 2):

We DO NOT believe that Judge Boyd has a dismissive attitude toward the Federal Due Process and Equal Protection guarantees set forth in the Bill of Rights and the Fourteenth Amendment. However, Judge Boyd treated Defendants' attempts to seek enforcement of these rights *vis a vis* the $20,720 fees judgment, as being of little consequence (perhaps he misconstrued our effort, as intending to start an inevitably time consuming action in Federal District Court, when in fact, we plan a direct appeal to the U.S. Supreme Court pursuant to 28 U. S. C. Sec 1257, which has a 90 day filing deadline after denial of discretionary

review by a State's highest court).

At the March 17, 2009 OEX Hearing Real Party's counsel Charles Jensen argued:

> Removal to the federal court requires that it be done in the beginning so that you preserve your right. The beginning of this case is now roughly a year and a half old. (Transcript at 4:21-25)

Judge Boyd somehow feels enforcement action can properly pre-empt an appeal:

> The intention to file an appeal has no bearing upon this Court's ability or the appropriateness of this Court, of course, having to go ahead and provide the judgment. (Transcript at 5:28 to 6:3)

Appellants' March 19, 2009 S170538 Update re Third Front Situation says (at 3):

We believe the ultimate jurisdiction of this Court to grant a stay to allow us to be free of interference (until our Petition for Certiorari is due in the U.S. Supreme Court), is supported by *Babb v Superior Court of Sonoma County* (1971) 3 Cal 3d 841, 851 (see Footnote 20.159 at 122 of Appendix H).

Judge Boyd ignored overlapping proceedings preparation-time, and asked again:

> Sir, are you willing to provide the requested bank statements, et cetera, requested by Mr. Jensen? (Transcript at 11:5-7)

James Parker said rushing into OEX proceedings violated his Due Process rights:

> I am not at this time, Your Honor, because respectfully, *I feel that's an unlawful order.*

> *Because we're in the middle of our appeals process, which is our due process right to spend [the time necessary for] all our [allowed] appeals.* (Transcript at 11:8-12)

James Parker asserted his federal appeal rights re the $20,720 fees judgment.

Judge Boyd said re Parker's reaffirmed refusal to answer financial questions.

> Now your refusing to do so exposes you to a contempt charge, which will include a fine of up to a thousand dollars and imprisonment not exceeding five days, or both. (Transcript at 11:21-24)

James Parker again opposed making his federal appeal rights ineffectual.

Judge Boyd did not say why ignoring federal appeal rights was lawful, but ruled:

> I have now given you a warning of your refusal to answer those questions and provide the information will be contempt of Court. You've indicated to me that you are still refusing to do it. The Court finds that to be an act of contempt. It is an act of contempt committed in the presence of the Court. Therefore, it's a direct contempt action. The Court therefore finds you in contempt of Court for failing to answer the questions. (Transcript at 12:5-13) (Appendix I ***8:5-20***)

Appendix G (41:18 to 42:3) and the January 24, 2008 Appeal Transcript discuss how the Sonoma County Superior Court policy, giving the landlord the first available trial date, makes it impossible for tenants to have any meaningful opportunity for discovery. Appendix G (42:4-12) rejects the assertion in the

Order of March 6, 2007 that missing and demonstrably perjured documents are not irregularities in the trial-date setting process. We cite *Green v Superior Court* to support Defendants' position that "just resolution of the question of possession" is more important than expedited procedures in unlawful detainer actions. Appendix G (24:20 to 26:13) cites departures from publicized (in the summons used by Sonoma County Superior Court and even in its own Hall of Justice) state standards for trial date standards violate the Due Process standards in *Adams v Murakami*. When Defendants sought to assert trial date setting procedural rights, which any self-represented tenant facing eviction would assume applied to their case, Judge Nadler responded with a threat of a Contempt of Court fine and/or jail sentence.

Defendants' Update seeking to avert canceling the March 24, 2009 hearing states:

Overlapping judicial attacks are apparently not enough of an impediment to Defendants' effective exercise of their right to appeal. Judge Boyd recently escalated the assault on our Due Process rights by directly attacking James Parker's ability to participate in the management of Defendants' case. Judge Boyd refused to wait for a Transcript (or for Defendants to get past the long delayed hearing on their fees postponement motion) and sent James Parker to jail for contempt of court. Thus, Judge Boyd made good on a threat which both prior trial court judges had used against Defendants.

Judge Nadler warned Defendant for protesting the local trial date setting process:

> We need to have an understanding with each

> other, Mr. Halliwell, you are now bordering in an area with your argument that I find to be disrespectful to this Court, and I'm going to warn you right now, sir, whether you are a lawyer or you are not, you are going to show this Court respect. By making accusations to the Court, such as accusations of unfairness or something along those lines, sir, that is bordering on contempt of court. So I'm going to admonish you right now, you need to hear this very clearly, I will not sit here and I will not listen to those sorts of arguments. If you continue to make arguments like that, then I will find you in contempt of court. If I do that, sir, you are going to be facing the possibility of fines and/or jail time for each instance of contempt, okay? (Transcript at 16:15 to 17:1) (CR-1785:19 to CR-1786:10)

Defendants cite Judge Rushing's contempt threats during the jury trial:

> Michael Halliwell tried to ask James Parker a question about the Homeowners' Association abuse of his Sixth Amendment rights, with a report where the names of all of his accusers had been redacted. Judge Rushing disallowed invocation of this additional part of the Bill of Rights, ruling: "It is irrelevant." (Transcript at 351:18) Michael Halliwell, in a tone of voice which must have clearly indicated his dismay at this turn of events, responded: "The Sixth Amendment is irrelevant. Fine." (Ibid at 351:19) Judge Rushing replied: **"You know what, Mr. Halliwell, I'm going to stop you from making those comments anymore in this courtroom. When I make a ruling that something is irrelevant,**

> **you don't comment to the jury that the Sixth Amendment is irrelevant, and I consider that contemptuous behavior. I won't tolerate it."** (Ibid at 351:20-25) (Defendants' February 1, 2009 Petition at 14:2-14)

Defendants cited *Baugess v Paine* (1978) 22 Cal 3d 626, 638, as valid authority:

> In cautioning trial courts to use their contempt powers with care, this court has repeatedly stressed the importance of permitting counsel to be a vigorous advocate: "He has a right to press a legitimate argument and to protest an erroneous ruling." [Citation.] Indeed, so essential is the "fundamental interest of the public in maintaining an independent bar" ... that "a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided, of course, that he does not resort to deceit or to willful obstruction of the orderly process." [Citation.] (CR-356:3-7) (CR 1754:17 to CR-1755:9) (Appendix I ***14:2 to 15:4***)

12. Judge Rushing's censure by Commission on Judicial Performance

Appendix H **[105:20 to 106:9]** cites a key aspect of evading the misconduct issue:

Charles Jensen's response to Defendant's November 21, 2007 Appeal is evasive:

Charles Jensen proclaims "**Respondent shall not respond to Appellant's [charges in] #26. [The charges in] #26 are nothing but personal slanderous attacks on Judge Rushing.**"

Appellants' November 19, 2008 Mandamus Petition seeking a rehearing notes:

Appellant's #26 is the crux of the material which Charles Jensen is unwilling "to touch with a ten foot pole" and it now stands as a matter of record that he has nothing to say to rebut Appellants' charges concerning "**Judge Rushing's 'Below the Radar' Moves to Evade 11-21-07 Exemption Claim.**" The key elements here are **i)** There is nothing in what Judge Rushing places in the record to indicate that her grounds for denying the Claim of Exemption on November 20, 2007 have been completely vitiated (by timely action by James Parker to perfect an appeal, which Judge Rushing had erroneously ruled to be ineffective); **ii)** There is no proof of service of Judge Rushing's Order of September 25, 2007 in the case file, a matter of crucial importance because if either the Court or the prevailing party had served such an order, the deadline for an appeal would be 30 days or October 25, 2007 under California Rules of Court Rule 8.751(a)(1) or (2); **iii)** Because only Charles Jensen's unsigned and not endorsed filed proposed order was given to James Parker on September 25, 2007, Rule 8.751(a)(3) is controlling with its "90 days after the entry of judgment" appeal deadline (December 24, 2007); **iv)** Judge Rushing tries to get around this problem by revising the history of the case, as #26 points out: "*Judge Rushing caused this bogus entry to be placed in the 11/07/2007 electronic docket: NOTICE OF ENTRY OF JUDGMENT SERVED 9/25/07*".

Appendix H **[121:16 to 122:22]** cites our right to know about a judge's history:

In his October 27, 2008 Opposition Brief all that

Charles Jensen would say concerning Defendants' quotations from the Commission's Report and Bob Egelko's June 9, 2006 *San Francisco Chronicle* article on this subject was: "This allegation is offensive and should be admonished." Egelko discussed Judge Rushing's censure "for driving drunk, lying about it and trying to get preferential treatment" and said of the CJP Report: "Superior Court Judge Elaine Rushing's criminal conduct was 'utterly irreconcilable with minimum standards expected of a judge,' and her attempt to use the prestige of her office for personal advantage was 'reprehensible.'" Defendants quoted the CJP Report: "None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal 3d 826, 865, that honesty is a 'minimum qualification' expected of every judge." Beyond Respondent's saying that he was offended, Charles Jensen said nothing to dispute Defendants' parallels between Judge Rushing's behavior in the incident for which she was censured, and their own experience in her courtroom. The parallel most relevant to Charles Jensen was the observation in the CJP Report that Judge Rushing told Officer Holeman "that in her courtroom she goes against court policies for CHP and other officers, and that he should extend that courtesy to her." (See discussion of how *Haworth v Superior Court* (2008) 164 Cal. App. 4th 930, 942 requires advance disclosure of a judge's having been censured by the Commission on Judicial Performance, and how a party is allowed to exercise his right to recuse such a judge, and to invalidate any rulings made by that judge when no disclosure of the censure has been made.)

Neither Judge Rushing nor Charles Jensen have disclosed his role in censure proceedings before the Commission on Judicial Performance.

Haworth v Superior Court (2008) 164 Cal.App.4th 930, 942 requires censure disclosure, citing "the repeated statements of the Legislature and the courts that neutral arbitrators must he held under the same standard of impartiality as the judiciary." The opinion notes "Judge Gordon did not disclose his censure prior to the arbitration, as required by California Code of Civil Procedure section 1281.9." (164 Cal.App.4th at 936)

Haworth notes: "[Respondent Court] found that a reasonable person advised of Judge Gordon's censure would entertain a doubt as to his impartiality, requiring disclosure pursuant to CCP Sec 1281.9." (Ibid) The opinion adds, "Moreover, judicial discipline varies depending on the severity of the misconduct, ranging from advisory letters to outright removal from the bench, and censure is one of the most severe forms of discipline available." (Ibid at 942) Our State Supreme Court observes in *In re Gordon* (1996) 13 Cal 4th 472, 473:

> The Commission on Judicial Performance has recommended that we publicly censure Norman W. Gordon, a judge of the Los Angeles County Superior Court, for engaging in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c)(2).) Judge Gordon has not challenged the commission's findings or recommendation.

Haworth concludes, by upholding the invalidation of

Judge Gordon's ruling:

> In sum, the facts of this case are such that a reasonable person aware of the circumstances would harbor a doubt as to Judge Gordon's ability to be impartial, so disclosure was required. Accordingly, Respondent Court properly vacated the [ruling below]. (Id. at 944) (**91:12 to 92:17**)

Defendants' March 27, 2009 Appendix re March 24, 2009 *Hagan* remand states:

Judge Boyd must be presumed to understand the full implications of his actions. In his former capacity of Presiding Judge of the Sonoma County Superior Court, he received numerous reports from Defendants about the misconduct of trial court Judge, Elaine Rushing, (which fit her pattern of trying to lie her way out of trouble, for which Judge Rushing was censured by the Commission on Judicial Performance in 2006, in Inquiry #177). Defendants reminded Judge Boyd of Judge Rushing's February 9, 2009 launching of "vexatious litigant" proceedings against Defendants, and of her sidetracking their motion to vacate a February 10, 2009 fees hearing, onto her March 24, 2009 Law & Motion Calendar (as clear a denial of justice by delay as one can imagine). Judge Boyd was fully informed at the March 17, 2009 hearing of the interference which his (March 20th to March 23rd) Contempt of Court jail sentence would create, with efforts by Defendants (at the March 24th hearing) to challenge the legitimacy of Judge Rushing's award without explanation of $19,000 in attorney fees (97% of what opposing counsel sought). Judge Boyd's contempt order falsely stated that there are no appeals still outstanding in this case. The link between confining

James Parker for nearly all of the three days just before the March 24, 2009 fees motion hearing and Defendants' pending Petition for Mandamus (S170538) was a main focus of our March 20, 2009 Motion. There is no legitimate reason Judge Boyd could not have waited to impose his jail sentence until after the March 24, 2009 fees hearing. **The illegitimate reason is as obvious as the sun in the sky, to anyone as fully informed about this case as Judge Boyd. Multiple judicial attacks from several directions, seriously hampers Defendants' exercise of their rights to appeal (in state and, if necessary, federal court), and a successful appeal by Defendants will damage Judge Rushing's chances for another six year term, when she is scheduled to face the voters in 2010.** (March 22, 2009 Habeas Petition at 4:2 to 5:19) (Appendix I ***4:6-20***)

Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

April 6, 2009

Michael Halliwell
James Parker
271 E Cotati Avenue
Cotati, CA 94931

Re S171792 (A124403) Halliwell v S.C. (Paxinos)

Dear Sir:

The court has granted permission to file the petition for review with appendix and the petition was filed today.

An answer to the petition may be served and filed on or before 4-27-2009, twenty days after the petition is filed. The answer may present additional issues desired for review if the petition for review is granted.

A reply to the answer may be filed within 10 days after the filing of the answer, limited to the additional issues presented in the answer, if any.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

By: H. Miner, Deputy Clerk

cc: Charles T. Jensen
Court of Appeal

Court of Appeal, First Appellate District,
Divison Two – No. A124403

S171792

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MICHAEL HALLWELL, et al., Petitioners,

v.

SUPERIOR COURT OF SONOMA COUNTY,

Respondent;

CHRYSANTHE PAXINOS, Real Party in Interest

The petition for review is denied.

SUPREME COURT

FILED

MAY 13 2009

Frederick K. Ohlrich, Clerk

GEORGE

Chief Justice

James Parker & Michael Halliwell
Defendants In Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526 halliwel@csulb.edu

RECEIVED
JUL 17 2009
Sonoma County
Superior Court

SONOMA COUNTY SUPERIOR COURT

Case No.: MCV 191306

Chrysanthe Paxinos
Plaintiff vs.

Michael Halliwell
& James Parker
Defendants

Defendants' Appendix to June 8, 2009 Memo re CCP § 916(a) Stay and July 14, 2009 Notice of Appeal re July 7, 2009 Hearing

The July 7, 2009 Claim of Exemption hearing before Judge Rushing is the latest manifestation of the conflict between Judge Rushing and Judge Boyd concerning the scope of CCP § 916(a) stay provisions re judgments consisting only of attorney's fees and other costs. (See CCP § 917.1(d), *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 654-655 & *Nielsen v Stumbos* (1990) 226 Cal.App.3d 301, 303). At this hearing, judgment creditor's lawyer (Charles Jensen) tried unsuccessfully to invoke Judge Beaupre's April 17, 2007 Vexatious Litigant Order. Charles Jensen then declined to say anything at all relating to the issues raised in James Parker's Claim of Exemption.

Dated this 16th day of July, 2009

Michael Halliwell
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

James Parker
Defendant pro se
271 E. Cotati Ave
Cotati CA 94931

Analysis of Hearing Filings and Transcript

In his Opposition to James Parker's prior Claim of Exemption, also involving enforcement of an attorney's fees judgment in spite of Defendants' still pending appeal, Charles Jensen said only that CCP § 917.1(d) and *Ziello v Superior Court* (1999) 75 Cal. App.4th 651, 654-655 "does not apply to James Parker." Charles Jensen's June 17, 2009 Opposition, which caused the July 7, 2009 Hearing to be held, said only: "Claim filed without leave of Court Order herein of April 17, 2009. Above Order incorporated by reference. This judgment is final, and no stay of execution has been granted; Claimant's citations are not applicable." Quotations from James Parker's Claim of Exemption are linked to related quotations from the July 7, 2009 Hearing Transcript.

A. Invocation of 4/17/09 Vexatious Litigant Order

Judge Rushing said at the outset of the hearing:

> The matter comes on today for a hearing on the defendant's Claim of Exemption on apparently a levy that was presented to the Sheriff's department, and I did receive the opposition to that. And it sets forth a couple of different statements.

And one of them I thought I'd deal with, first of all, is the claim per the court order of April 17th. And as to that, the defendants didn't file that with the Court, naturally. They filed their Claim of Exemption with the Sheriff's department, as I understand it, they levying office, and that's where they should file it. So I can't see – I mean, as per the way this thing works, you're the one who filed something in this Court, which is a Notice of Hearing. So they presented their opposition – I mean, they presented their claim. That's what they should do, is to present it to the Sheriff. The Sheriff doesn't have any authority to not accept it, so I don't particularly think that ground has any merit, unless you have something else to say. (Transcript at 2:13 to 3:4)

Charles Jensen responded to Judge Rushing:

Except thereafter, Your Honor, they attempted to file with the Sonoma County clerk on June the 11th, and it's the points and authorities that are contained in there that are addressed by my notice that they were not in compliance with the vexatious litigation order. I have an endorsed copy, endorsed filed copy, if the Court would like to see it. (Ibid at 3:5-11)

Judge Rushing replied: "Of what?" (Ibid at 3:12)

Charles Jensen resumes his testimony:

Of what they claim to be a claim of exemption, supporting affidavit and response, et cetera, et cetera, et cetera, Sonoma County Court, June the 11th. It appears to be at 2:11 p.m. in the afternoon. [THIS IS FALSE. The date is indeed "2009 JUN 11" and time stamp is indeed "P 2:11" but

there is NO SONOMA COUNTY COURT stamp, instead there is "SONOMA COUNTY SHERIFF CIVIL BUREAU"] And since it is in front of the Court, it would be subject to the vexatious litigation order to be prior approval. (Ibid at 3:13-19)

Judge Rushing answered: "No." (Ibid at 3:20)

Judge then went back and amplified, saying:

I'm not the one who would ever be acting on these requests to file anything by a vexatious litigant because that goes to the Presiding Judge. But I can't imagine a Presiding Judge not permitting a defendant whose funds have been taken on a writ of execution, they couldn't file an exemption, if he had a reason to do that. So I think it would be an exercise in futility, just waste time for me to say that this kind of thing would go to Judge Nadler. He's not even here right now. We would just put this thing over, and everybody would have to come back again. For that reason also, I don't think that's – well, whatever the clerk's office did in accepting or not accepting that filing, the fact of the matter is they did the proper – Mr. Parker did the proper thing in presenting this Claim of Exemption to the Sheriff's department, which received it and sent us copies of everything. (Ibid at 3:24 to 4:12)

After saying "I'm not going to rule against you because you filed something" and acknowledging both parts of James Parker's Claim of Exemption, Judge Rushing told Mr. Parker:

Mr. Jensen filed an opposition, Notice of Opposition to the Claim of Exemption on a Judicial Council form. It was received at the Sheriff's department on June 18th. They sent all that as a packet to me. That's what we always do. And one of his arguments, his first argument, really, is the claim – that you filed the claim without leave of court per Judge Beaupre's Order of April 17th. And I'm saying I'm ruling against him on that point. That's all. (Ibid at 5:6-14)

B. Reasonableness of Seizure of Defendant's $833

Judge Rushing focused on a basic financial issue:

I'm not going to ask Mr. Jensen to say anything yet because I'm going to talk a little bit about this whole procedure myself. I'm surprised Mr. Parker, that with the research that you have apparently done and looked into the code sections involved that you didn't, number one, avail yourself of the Judicial Council form for Claim of Exemption which, although not mandatory, is useful as a framework in placing before the Court the information that a judge needs to have to rule on your claim. (Transcript at 8:27 to 9:8)

James Parker's June 11, 2009 Affidavit (#4) says:

I have no doubt that this $833 asset seizure is "small potatoes" for someone who earns $230 per hour, as Charles Jensen does. I believe the main reason for this harassment is to try to disrupt Defendants' preparation of their appeals invoking their Fourteenth Amendment rights to Due Process of Law and Equal Protection under State Law.

Judge Rushing didn't seem to understand why Defendants gave top priority to preparing appeals and were not able to fully research their response to Charles Jensen's harassment. She continued:

But the form which is available on the Internet has the things that you need to tell me. For example, you do cite in your non-Judicial Council form, you cite in the beginning a statute – well, actually not in the beginning. It's the page that you actually cite reasons why I should grant this request. It's your affidavit, June 5th affidavit. In the very first paragraph you do cite CCP Sec 703.520(b) which has what you say, you're required to tell me certain things. That's true, but not only are you supposed to tell me your name and your address, but you're supposed to list a specific description of the property claimed exempt, a citation of the exemption statute upon which your claim is based, a statement of the facts which support the exemption claim, and then other information, depending on the nature of the claim. For example, if you were claiming that your – the property is exempt because it was your motor vehicle or tools of the trade, then I need certain information. You might in certain circumstances, be required to file a financial statement, depending on the kind of things you're claiming. So I read your Claim of Exemption and tried to figure out all this information by myself because you didn't give me the code sections and it's not – it's not obvious.

For example – I will give you an example. Sorry. Okay. It is true that under a certain code section

earnings paid to the judgment debtor – that's you – within 30 days before the writ of execution is levied upon, okay, or other – I'll read that again. Earnings paid to the judgment debtor within 30 days before a writ of execution is levied and that can be traced to deposit accounts may be wholly or partly exempt. And that's CCP Sec 704.070. When I look on your claim, you talk about earnings, but I have no idea when they you were paid to you because you didn't tell me.

There's another exemption for certain unemployment benefits. There's another reference in your claim to that, but again, first of all, you have to affirmatively state to me: I received unemployment benefits from such and such, when and they have to be traceable as proceeds to an account. And that's all your really had to do to state your claim, and then I would be able to rule on it. That's another CCP Sec, 703.080 and 704.120(c). And so your not making it easy for me, frankly, to give your claim the attention that I need to pay to it. (Ibid at 9:9 to 10:25)

Judge Rushing later said to James Parker:

We're going to proceed ahead with the substance of this. And so what's your comment on the fact that you didn't in your Claim of Exemption give me the information I need? (Ibid at 12: 5-7)

Judge Rushing said why she needed clarification:

Mr. Parker, I should tell you that exemptions are creatures of statute and no property is exempt from enforcement unless specifically made so by law. And the courts may not increase the statutory exemptions. I have to look at each Claim of

> Exemption, find it in a statute, and see if it applies. So that's why I – you didn't follow – you didn't have to file the Judicial Council form, if you didn't want to. It's not a mandatory form, but it's a good guide to tell me the kind of information that I just told you I needed, so I still don't understand why you didn't do that since you went to all the trouble to file this long paper. And the statute tells you what you need to do. I mean, I don't know enough about your – the money in your bank account to know if it qualifies or not. That's the problem. (Ibid at 12: 12-26)

Judge Rushing seemed to realize that it would take some time for Defendants to research and evaluate their rights and responsibilities under these statutes, and she acknowledged: "under certain circumstances you might be entitled to a continuance." (Ibid at 9:8-9) James Parker referred to this offer, and the confusion created by Charles Jensen's non-informative grounds for Opposition:

> But we need to ask for a stay until this transcription is – the transcript is available – so we can – we can answer your confusing charges to us, and Mr. Jensen's non-charges, because they're not – he just says there's no statute. There's no this, no that. (Ibid at 16:5-9)

Judge Rushing seemed to rule out a continuance:

> Is there some reason you can give me why you didn't give me the information to start with? You looked up all those code sections that you cited to

me dancing around those code sections that I think that you want me to look at, which I already told you what they were, having to do with wages placed in an account and possibly unemployment insurance benefits. I'm not telling you [that] you have to look them up, or you have to tell me anything about your finances. You don't have to do anything. On the other hand, I can rule against you because you didn't tell me what I need to know to rule on. (Ibid at 16:10-20)

James Parker explained his perspective on this:

We need to have at least ten days so we can look up what you're saying because it could be – mean nothing, Your Honor. No offense. But you haven't given us any citations, except those kind of vague reasonings that we have to take and parse word by word, because I'm no attorney. I cannot decipher all of this, what you've said here and now. (Ibid at 17:4-10)

C. Defendant's Answer to Grounds for Opposition

James Parker read his statement into the record:

Charles Jensen's Opposition to my Claim of Exemption takes up no more space than his name and address at the top of this filing. As always, he cites no authority for any of his three terse statements: One, the judgment is final. Two, there has been no stay. Three, that Claimant's citations are not applicable. And I will try very briefly to address that.

Number one, as far as the judgment is final, contrary to Superior Court judges who proclaim

themselves to be the only arbiter of the correctness of their decisions in limited jurisdiction cases, *Elkins v Superior Court of Contra Costa County* (2007) 41 Cal 4th 1337, 1353, clearly shows that the top court with jurisdiction to review a case is the final arbiter. In unanimously supporting a petition which has been summarily denied by the Court of Appeal (41 Cal 4th at 1350-1351), our Superior Court gave – excuse me – our Supreme Court gave precedence to, "the public interest in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding," over the Superior Court's truncated procedures advanced "in the name of efficiency and conservation of judicial resources." In the *Elkins* case, all seven justices agreed: "We are most disturbed by the possible effect the [Contra Costa Superior Court] rule and order have had in diminishing litigants' respect for and trust in the legal system."(Id. at 1367)

Number two, in relation to "there has been no stay," Mr. Jensen's claim: As we clearly demonstrated, the last time Charles Jensen sought to enforce a judgment for attorney's fees and other costs, before the judgment debtor had brought his appeal to the highest court with jurisdiction, *Ziello v Superior Court* (1999) 75 Cal.App.4th 651, 654-655, clearly establishes that where there are no money damages that have not been paid, "the order on appeal is 'solely for costs within the meaning of Code of Civil Procedure sec 917.1(d). Accordingly, no bond is required to stay enforcement of that order pending appeal.'" (Transcript at 6:7 to 7:16)

James Parker tied the cited precedent to his case:

Since there had been no money damages in *Paxinos v Halliwell & Parker*, only the rent which tenant Parker offered to pay and the landlord had refused to accept, and this rent was paid promptly as soon as Gus Paxinos was willing to accept it, *Nielsen v Stumbos* (1990) 226 Cal.App.3d 301, 303, also applies:

> We are called upon to determine whether enforcement of the award of attorney's fees, together with other costs, is automatically stayed by the taking of an appeal.
>
> Resolution of that question hinges on whether attorney's fees recovered pursuant to a contractual provision are an element of cost, when, as here, respondent did not recover money damages.
>
> We conclude that in such a case, the fees are costs and that the filing of a Notice of Appeal stays execution without the posting of an undertaking [which is another term for an appeal bond].

Number three, Charles Jensen's third claim, "Claimant's citations are not applicable," does not provide the barest explanation of why that is so. Accordingly, it is not a statement of reasons for opposing a Claim of Exemption within the meaning of CCP Sec 703.560(b). If and when Charles Jensen satisfies his statutory obligation to state his grounds, I am entitled to ten days to study his reasons before proceedings can go further. Should this Court find anything Charles Jensen says today to be persuasive, I am entitled to invoke

> CCP Sec 703.580(a) which provides a right to amend my Claim of Exemption, "in the interests of justice," and to a continuance under CCP Sec 703.580(c) so that I can "produce other evidence, oral and documentary."
>
> And that's my position. (Ibid at 7:19 to 8:26)

Judge Rushing asked James Parker: "What appeal would be stayed that you're talking about?" (Ibid at 11:19-20) James Parker responded:

> Since our position is that this is a due process issue, the federal appeals are not irrelevant. And what I just stated to you, in *Nielsen v Stumbos*, doesn't limit appeals to just the state. It said – it states until the appeal is decided. (Ibid at 11:20 26)

After Judge Rushing ruled against him on the applicability of Judge Beaupre's Vexatious Litigant Order, Charles Jensen responded: "But leaving that aside on a procedural note, the balance of my claim is that they have raised no legal opposition." (Ibid at 3:21-23) Charles Jensen had little to say about this:

> But nowhere in the purported papers are there statutory claims that would be sustained for a Claim of Exemption which is why my papers simply say that there is no stay. There is not. And that the citations are not applicable. They are not. And I'll leave it at that, Your Honor. (Ibid at 15:6-11)

D. § 916(a) Reading by Judges Rushing and Boyd

James Parker cited his main basis for exemption:

> I would point out to you in regards to your – your suggestions of what I should have done, but I suggest that they're moot because under Section 916(a) the judgment is stayed so other aspects are irrelevant. (Transcript at 11:1-4)

Judge Rushing responded to this point by saying:

> Okay. I'll talk about that for a moment. Nothing is stayed. There's no appeal. You've exhausted all your appellate rights. You've gone way beyond that. There's not an appeal. Your appeals have been ruled on. All appeals that I know of have been ruled on, and you have exhausted your legal rights. You have filed lots of writs in the past, which don't stay anything unless the court stays it. (Ibid at 11: 5-11)

Judge Rushing continued, without citing any supporting precedent for her limited view of a litigant's appellate rights:

> And so you could have continued to file things, if you want to, with the U.S. Supreme Court. That has absolutely nothing to do with staying anything here. (Ibid at 11:15-18)

James Parker cited Judge Boyd's ruling on this:

> Judge Boyd in OEX hearings stayed those hearings as premature because he agrees federal appeals are relevant. (Ibid at 11:27 to 12:1)

Judge Rushing responded by saying:

> I believe he's wrong. I just have to say it. This is before me now. Each judge has to decide for themselves, and so I – I'm ruling against you on that point. (Ibid at 12:2-4)

James Parker pointed out the absence of any supporting precedent for Judge Rushing's ruling:

> All this court says is they don't agree with Judge Boyd. What statutes and citations are you standing upon, that the federal appeals don't count? (Ibid at 13:3-5)

Judge Rushing responded:

> I don't say they don't count. You can go to the Supreme Court. If they want to look at your case, they'll look at it. I'm just saying in the meantime there is no stay. (Ibid at 13:6-9)

Defendant's Claim of Exemption notes (at 5:9-14) that *Betz v Pankow* (1993) 16 Cal.App.4th 931, 938, points out a well established rule:

> As a general rule, "the perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order ...." (§ 916, subd. (a).) The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. (Defendants' Memorandum re December 19, 2008 OEX Hearing at 13:1-18)

Judge Rushing implies that James Parker is not talking about a substantive issue, and adds: "I don't have to give reasons." (Ibid at 13:11-12) In response, James Parker says: "Your Honor, I would refer you again to CCP Sec 916(a) and *Betz v Pankow* (1993) 16 Cal.App.4th 931, 938." (Ibid at 13:16-18) James Parker then explains:

> Until our appeal is fully heard and fully resolved, the Court has no jurisdiction to act in this matter, so we challenge your authority [to act now] – you cite no authority. You've just decided for yourself contrary – (Ibid at 13:22-25)

Judge Rushing interrupts to say "No." (Ibid at 13:26) James Parker resumes by saying:

> If I may, Your Honor, contrary to what Judge Boyd did, and Judge Boyd told us in court that he did contact the state court, and I believe he contacted the federal courts, and he did his research there. (Ibid at 13:27 to 14:2)

James Parker complains about Judge Rushing's refusal to explain her departure from governing precedents, which aids and abets Charles Jensen's obscurity in stating his grounds for Opposition:

> We had no idea you were going to invent some kind of retort to avoid Mr. [examining] Mr. Jensen's claiming the judgment was final, which we don't agree with, that Judge Boyd doesn't agree with. You have not been willing to state

> anything [to explain] why you say Judge Boyd is wrong. You just say, oh, he's wrong. And his [Jensen's] false claim that there's been no stay. I have just read to you why there's an automatic stay, and it has to do with it being attorney's costs, you know, more or less. And that he makes this vague claim that you should say – you say we should respond to, and that claim is that Claimant's citations are not applicable. (Ibid at 17:12-23)

E. Defendant's Resistance to Disclosing Finances

James Parker's Affidavit of June 5, 2009 (#3 & #4) pointed out that his previously disclosed monthly wages (which were $345.99 in April 2009, when Charles Jensen's Writ of Execution was issued) and Unemployment Benefits (about $500 in that month) fully accounted for the money he was accumulating to pay for his share of rent and expenses, when Charles Jensen cleaned out his Redwood Credit Union funds. His Claim of Exemption (at 4:3-8) cites his bitter experience with Judge Rushing's circumvention of legal limits on her right to turn over his assets to Charles Jensen:

> It is hard to understand on what basis Judge Rushing provided a signed copy of her order for $10,000 in attorney's fees to Plaintiff's counsel only, but she apparently did this to facilitate

> Charles Jensen's "stealth" attempt to do an end run around the governing precedent (*Ziello v Superior Court* (1999) 75 Cal.App.4th 651) barring enforcement of fees-only judgments pending resolution of an appeal. Judge Rushing operated even further "below the radar" in her handling of Defendants' Claim of Exemption re the $10,000 fees award. Defendants did not find out how the $10,000 turnover had been accomplished, until May 7, 2008 when the Sheriff's Department finally agreed to provide the document Judge Rushing used (with nothing ever appearing in the case file to indicate what she had done).

Judge Rushing alludes to Defendant's reasons for distrusting her, when she says "You have a lot of criticisms of me." But she offers no justification of her past actions, and dismisses the subject by saying: "When I do have to give reasons, I do –" (Transcript at 13:10-12)

Judge Rushing later said to Plaintiff's counsel: "Let's hear from Mr. Jensen. He gets to say something here too."(Ibid at 13:28 to 14:1) Jensen replied:

> As God is my witness, I really don't know how to respond. In the papers that were filed – I've gotten used to having the mud slung. I apologize to this Court if I'm the one that drug you into this. (Ibid at 14:2-5)

James Parker discusses the consequences of his refusal to provide the financial information which

Charles Jensen tried to secure, in proceedings before Judge Boyd:

> We were in Judge Boyd's OEX hearings seven times or eight times until he finally stayed [further proceedings]. And you're wanting information from me suggesting that I disclose my finances. I did not go to Judge Boyd's court seven times and spend time in jail for standing up for my rights so I could roll over and tell you about my unemployment and my income. That's stayed.
>
> You have no right, as far as we can tell, for you to require in any way, shape or form to try to muddy the waters and say that I should have given up that information. According to the judge who held the Order of Examination hearings, which are financial hearings, he stayed those hearings. (Ibid at 14:3-17)

Judge Rushing said to James Parker: "I thought he put you in jail." (Ibid at 14:20) James Parker answered: "He did." (Ibid at 14:21) Judge Rushing continued: "Well, then I guess he changed his mind; didn't he?" (Ibid at 14:22-23) James Parker replied:

> Yes, he did. He changed his mind, and I went to jail for nothing, Your Honor, because he was wrong in his judgment, and he at least came forward and corrected his error, Your Honor. (Ibid at 14:24-27)

Judge Rushing said to James Parker:

> It is your burden, actually, as the person making the Claim of Exemption to show your entitlement to a Claim of Exemption. It is entirely your personal decision in the matter, what you tell me, what you don't tell me. I'm not suggesting you do anything. I'm explaining to you if you had wanted to bring a Claim of Exemption based on some other ground such as you need a certain amount of money left in your bank account to live on or something, then you'd have to file a financial statement. You didn't claim that ground. But I don't know what claims that you're basing your claim on because you didn't tell me. That's the problem. (Ibid at 15:12-22)

James Parker replied by pointing out the need for a stay to allow Defendants to cope with the problem caused by Charles Jensen's continuing evasiveness:

> Well, Your Honor, you're – essentially Charles Jensen is saying because he claims citations are not applicable, we as pro pers have to research the law from A to Z to discover why they are not applicable. We say that he's required specifically ten days before a hearing goes forward, and the reasons for bringing this hearing, why Claimant's citations are not applicable. We did the same thing on the first $10,000 judgment. He said the – well, he said that – it didn't apply, but he didn't say why. [So], we need to ask for a stay. (Ibid at 15:23 to 16:5)

James Parker said of Judge Rushing's approach:

> Your grounds are only we didn't give you information, which is voluntary, that would violate

the terms of the OEX hearing and that is stayed, that divulges my financial resources or any part of my financial resources. (Ibid at 16:26 to 17:2)

F. Judge Rushing's Shuts Down Proceedings

James Parker's June 11, 2009 Affidavit (#5) says:

At no time in these two years of proceedings has any judge of the Sonoma County Superior Court paid the slightest attention to Defendants' well documented charges of violations of the code of conduct for attorneys set forth in Business and Professions Code Section 6068(d). Since *Clark v Millsap* (1926) 197 Cal 765, 785, bars payment for an attorney's fraudulent activity, unresolved charges of misconduct against Charles Jensen are a sufficient basis for denying him any payment whatsoever.

Defendant's Claim of Exemption notes the extent of judicial shielding of Charles Jensen's dishonesty (at 12:23 to 13:4):

James Parker's November 20, 2008 oral remarks give the details of eight false statements in Respondent's October 27, 2008 Opposition Brief (Transcript at 13:27 to 17:3), and the lie in Charles Jensen's oral statement (the details of which are set forth in our January 2, 2009 Mandamus Petition at 53:16 to 54:8) which Respondent's Opposition does not try to explain, except to say: "Counsel for Respondent has never been caught lying." James Parker further quoted Respondent's Opposition: "While counsel for respondent has read the appellants' Index of

> Plaintiff's Misrepresentations and Rules Violations, there was nothing in it worthy of response." James Parker then asked: "Does Charles Jensen wish at this time to explain any of his latest alleged misrepresentations, or cite anything incorrect in our previous charges of professional misconduct?" When Charles Jensen said nothing, James Parker said to the Court: "Your Honor, I just want it to be said that there was no response." Judge Chouteau responded: "I am indicating there should not be a response." (Transcript at 17:7-23)

Defendant's Claim of Exemption (at 15:10-24) protests Judge Rushing's protectiveness of Jensen's unsubstantiated charges, when the fees award being enforced was made on May 6, 2008:

> Charles Jensen's dismissive tone continues in his March 26th 2008 perfunctory opposition to reconsideration where he refers to defendants' completely accurate quotations and citations, which are cross-indexed as thoroughly as time permitted us to be able to do as, quote "whimsy, dribble and nonsense," unquote.
>
> He continues: "Nowhere were there or are there cohesive legal thinking and conclusions based on law and the facts of this case," end quote. In his effort to justify $20,000 in additional fees for this sort of work product, Charles Jensen's recent motions without proof of service declares without a semblance of any supporting examples – one last sentence and then a question. And this is what he wrote: "Defendants forced plaintiff's

counsel to read all of his papers. Unfortunately, counsel was not in a position to assume they were all a joke. An old Irish saying states: 'Even a blind pig can find a truffle every now and then.' These were not easy papers to read either. The arguments, and the term is used loosely, we they were disorganized and incoherent at best."

First of all, defendants resent being likened to pigs finding a truffle. This has been his attitude towards us all along, that we were nothing but scum, but that's neither here nor there. But the point is he's never – he's never controverted with law any of the citations that we have – that we've briefed – briefed him on. All he has said is they're "dribble, nonsense and whimsy" so I would like to ask the Court to ask him what percentage of those citations that we issued – what fraction are "whimsy, dribble and nonsense?" (Transcript at 16:14 to 17:14)

Judge Rushing answered: "I'm not going to ask that question." (Transcript at 17:15-16) James Parker replied: "One last thing, then. Okay. I would just like to ask one more question. Can he now cite any one citation that's "whimsy, dribble and nonsense?" Judge Rushing said: "I'm not going to force him to do that." (Transcript at 17:20)

James Parker starts to point out the connection between Judge Rushing's previous protectiveness toward Charles Jensen, and the issues at the current Claim of Exemption hearing:

> We have no way of knowing what he's referring to. He's cheating here. He's not giving any specific reasons whatsoever, and the reasons that he is giving are false reasons. He's been told that [in OEX proceedings before] Judge Boyd. And if you'll notice, he did not appeal Judge Boyd's ruling. He just let it sit, because he knew he wasn't going to get anywhere because he knows from the very beginning that *Ziello*, et cetera do hold and he's trying to do an end run round it and avoid Judge Boyd's [ruling] – Judge Boyd's court by coming before an extremely sympathetic judge to him. (Ibid at 17:24 to 18:5)

Defendant's Claim of Exemption (at 13:6-18) cites Judge Rushing's censure for previous evasiveness and her expectation of reciprocity in favoritism:

> Charles Jensen certainly does not agree with the position of the California Commission on Judicial Performance that "Judge Rushing's conduct violated canons, 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impar-tiality of the judiciary." However, he is in no position to sweep aside such a finding with the sort of *ad hominem* attacks, which he uses to try to discredit Appellants' charges (documented at a level sufficient to justify the reopening of Judge Rushing's case by the Commission on Judicial Performance).
>
> The CJP summarized its findings: "None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal. 3d 826, 865, that

> honesty is a 'minimum qualification' expected of every judge." (CR-1867: 19-21, CI 3170) The CJP report pointed out that "Judge Rushing's conduct violated canons, 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary)." (CR-1866:15-16, CI 3169) (Id. 2:2-21) In **Section V** Respondent argues: "*Appellant's 29 is insulting and no response will be tendered.*" Respondent is offended by the possibility that Judge Rushing might have been telling the truth, and actually believed in favoritism when (according to a 2006 Report by the Commission of Judicial Performance) she made this admission: "Judge Rushing then told Officer Holeman that in her courtroom she goes against the court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate court justice."

Having read Defendant's Claim of Exemption and dismissed (Transcript at 16:22-23) 95% of its pages as irrelevant, Judge Rushing knew what Defendants thought was the well spring of Judge Rushing's mutual protectiveness. James Parker observes (at 14:9-11) of this June 11, 2009 document:

> Here the Commission on Judicial Performance notes that one reason it did not seek to remove Judge Elaine Rushing from office, was the fact that several members of the legal community came forward in her defense. Judge Rushing has not made the list of her supporters public, and

> the attorney she has awarded $50,000 in attorney fees to has refused to say whether he is among those who urged that Judge Rushing be retained in office.

James Parker connected Charles Jensen's evasive approach to the July 7, 2009 hearing with Jensen's misconduct in earlier proceedings, which had been tolerated by Judge Rushing:

> And we have stated the reasonings in our – all our documents why we feel this court is very sympathetic to Mr. Jensen. And I do not want to embarrass the Court by going through that material, but the Court knows what that material is. And it would seem to me the Court would bend over backwards not to give that impression, but the Court continues never [requiring] Mr. Jensen to say anything in substantive response. All he does is spout vagaries, puffery, exaggerations, and he's never really been called on it. (Transcript at 18:6-14)

Judge Rushing became increasingly irritated as James Parker referred to past misdeeds of Charles Jensen which have been extensively documented in the Case Record. James Parker continued: "We believe Mr. Jensen's guilty of fraud and perjury –" (Ibid at 18:14-15) Judge Rushing interrupted at this point with an exasperated "Okay." (Ibid at 16) James Parker resumed: "– and we've made that

claim." (Ibid at 18:17) Judge Rushing again interrupted with an even more emphatic "Okay." (Ibid at 18:18) James Parker protested Judge Rushing's interruptions: "Your Honor, and you're trying to shut us down." (Ibid at 18:19-20) Judge Rushing would hear no more, saying: "That is now enough. I have been more than patient. The motion for Claim of Exemption is denied. The hearing is over." (Ibid at 18:21-23)

No. 09-199

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR REHEARING

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
271 E. Cotati Ave, Cotati CA 94931
707-795-5526, halliwel@csulb.edu

November 6, 2009

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09-199 CERTIORARI REHEARING PETITION

1. Once again OEX proceedings at a crossroads

On July 7, 2009 Judge Rushing turned over to Plaintiff's counsel, James Parker's $833 (from his part-time monthly paycheck of $350, plus $483 in unemployment benefits) which had accumulated in Parker's bank account, since Judge Rushing's off-the-record turnover of $10,118 from this account (on November 26, 2007, in defiance of the automatic stay while an appeal is pending of CCP § 916(a), before there had been ANY appellate review). James Parker protested to Judge Rushing: "Judge Boyd in OEX hearings stayed those hearings as premature because he agrees federal appeals are relevant." (July 7, 2009 Transcript at 11:27 to 12:1) Judge Rushing replied: "I believe he is wrong. I just have to say it. This is before me now. Each Judge has to

decide for themselves, and so I'm ruling against you on that point." (Ibid at 12:2-4)

Judge Robert S. Boyd would like to simply do his own job of enforcing judgments which other judges have made, without addressing the bitter legacy of a judge (the Honorable Elaine Rushing) who has been censured by California's Commission on Judicial Performance (Inquiry #177) for dishonesty, admitted favoritism in her courtroom, and seeking favored treatment for herself because her husband is a Justice of California's Court of Appeal. Once again Judge Boyd (after doing so in his Orders of July 23, 2008, January 20, 2009 and April 17, 2009) has gone to the brink and pulled back. On October 20, 2009 Judge Boyd cancelled a three-day jail sentence he had imposed on James Parker (for refusing to give up on his Supreme Court appeals, before seeking a Rehearing under Rule 44). Judge Boyd's Order of

October 20, 2009 once more "kicks the can down the road" and states:

> The court on its own motion, hereby stays the enforcement of the order of contempt announced at the hearing on the above matter held on October 19, 2009, and orders this matter to be re-scheduled for hearing on November 23, 2009 at 8:15 a.m. in Courtroom 17.

Judge Boyd is a former Presiding Judge of Sonoma County Superior Court, and he is acutely aware of his colleagues' need to renew their mandate with the voters every six years. Defendants would like their case to be decided on the merits (instead of having embarrassing aspects swept under the rug to protect Judge Rushing, whose current term expires in 2010). The United States Supreme Court faces a similar dilemma. It surely realizes that there are enough dishonest state judges willing to trample on federal constitutional rights, that it would have time to do very little else, if it constituted itself as a court

of last resort to safeguard judicial integrity. On the other hand, the High Court would like to keep faith with its proclamation in *Cooper v Aaron* (1958) 358 U.S. 1, 19-20, which concludes by affirming: "Our constitutional ideal of equal justice under law is thus made a living truth."

It is obvious why evicted tenants seeking to ultimately vindicate their invocation of the Bill of Rights (their right to be informed of the charges against them and to confront their accusers) would want to transfer their case to Federal District Court to seek enforcement of *Shelley v Kraemer* (1948) 334 U.S. 1, 20, with respect to Covenants, Conditions and Restrictions (CC & R's) which deny tenants a right to confront their accusers, in Homeowners Association CC & R enforcement proceedings:

> The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied

> rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

It is not at all obvious why the Supreme Court would wish to make its difficult choice in this case, without the benefit of the reliable factual record, which it can easily secure by means of a remand to Federal District Court.

2. Enforcement of judgments before finality

Prompt transcript availability (often on the same day as a hearing) for Judge Boyd's judgment enforcement hearings has played a key role in his backing away from premature enforcement (contrary to CCP § 916(a) and 917.1(d)) of judgments which consist entirely of attorney fees and other costs. However, Judge Boyd refused to even allow briefing on the obstruction of justice charges re other courts which are the main focus of the disputed fees motion (see October 5, 2009 Transcript at 13-14).

Nothing a court tried to do to uphold the rule of law would be effective, if it did not have the power to protect the integrity of its own process.

Bulloch v. United States (1983) 721 F.2d 713, 719 discusses considerations relating to rectifying fraud:

> As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof. Rule 60(b) does not impose a time limit on motions asserting fraud on the court.

Chambers v NASCO, Inc. (1991) 501 U.S. 32, 53 discusses the scope of sanctions for attempting to defraud the court, noting that "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 246 observes:

> The public welfare demands that the agencies of public justice be not so impotent that they must

> always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 239-240 observes:

> After a hearing the Circuit Court concluded that, since the alleged fraud had been practiced on it rather than the District Court, it would pass on the issues of fraud itself instead of sending the case to the District Court.

Concealing the authorship by Plaintiff's counsel (Charles Jensen) of the hearsay complaints (with names redacted) compiled by "a neighbor" and submitted to the jury over our strenuous efforts to exclude this Exhibit (#5), is no less fraudulent than the article used to mislead the courts in *Hazel-Atlas*, *supra*.

Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 247 observes:

> Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed.

> They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given – that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

In *Hazel-Atlas Glass Company v. Hartford Empire Company* (1944) 322 U.S. 238, 251-252, Justice Roberts observes in his concurring opinion:

> No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. Respect for orderly methods of procedure is especially important in a case of this sort.

So long as the victims of fraud on the court move promptly to seek redress, normal rules of finality do not apply. *Hanover Insurance Co. v United States* (1989) 880 F.2d 1503, 1505, defines finality as "when the courts no longer possess power to reopen the

matter." But *Hanover* continues (880 F.2d at 1508, Footnote 3):

> The rule, of course, applies to legitimate decisions; the cases agree that in those rare instances where fraud on the court has been practiced, the judicial function itself has been undermined and the decision must be reopened to cleanse the process. See, e.g., Toscano v. Commissioner (1971) 441 F.2d 930, 933; Kenner v. Commissioner of Internal Revenue (1968) 387 F.2d 689, 691; Sweet v. Commissioner of Internal Revenue (1941) 120 F.2d 77, 81.

Every one of the nine prior Order of Examination (OEX) hearings, which Judge Boyd eventually ruled had been premature, were instigated by Plaintiff's counsel to try to disrupt Defendants' ongoing appeals (and this was no less true of his October 19, 2009 effort to ignore Supreme Court Rule 44.1).

Hanover Insurance Co. v United States (1989) 880 F.2d 1503, 1506-1507 observes:

> The lesson of *Simpson & Co. v Commissioner of Internal Revenue* (1944) 321U.S. 225, 230 is that the Court's jurisdiction is preserved for the period specified in its rules. . . .

> [In *Sweet v. Commissioner of Internal Revenue* (1941) 120 F.2d 77, 80] Judge Magruder foreshadowed what we might now call a Simpsonesque interpretation: "final" for this purpose may refer not to the date of denial of certiorari (notwithstanding use of the term), but "perhaps [depends] upon the lapse of twenty-five days, ... during which period, under the rules of the Supreme Court, the petitioners might have asked for a rehearing." In our judgment, *Simpson & Co. v Commissioner of Internal Revenue* (1944) 321 U.S. 225, 229-230 conclusively proved the accuracy of the *Sweet* augury. . . . . The Court plainly foretold the outcome of our inquiry by declaring that the statutory finality provisions must be read in conjunction with the rule as to rehearings. . . . . [Thus,] "the denial of a petition for certiorari should not be treated as a definitive determination" in the Supreme Court until the period for filing a rehearing petition has expired [*Flynn v United States* (1955) 348 U.S. at 900].

The focus of the October 19, 2009 OEX hearing was Charles Jensen's attempt to ignore Supreme Court Rule 44, and enforce judgments which were not final (even if one does not consider the file tampering and other fraud by which they were secured). *Plaut v Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 227 notes:

> Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.

There is no doubt that where claims arise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment (as is undisputed in *Paxinos v Halliwell & Parker*) *Brinkerhoff-Faris Trust & Savings Co. v Hill* (1930) 281 U.S. 673, 681 is controlling: "it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final."

3. Federal consideration of federal claims

Judge Rushing was not willing to wait for the discretionary review process to run its course in state court, before piling another $19,000 in attorney fees on top of her previous ($30,000-plus) awards which James Parker was appealing. On February

10, 2009, Judge Rushing ruled: "I actually differ from Judge Boyd in my view of the case. This is a limited- [supposedly to $25,000] jurisdiction case. And that means the appeal rights extend to the Appellate Division of the Superior Court." (Transcript at 7:21-24) When the California Supreme Court did complete its process of discretionary review by denying Defendants' petitions, Charles Jensen argued that these denials were rulings on the merits of the claims Defendants have been struggling to have adjudicated. In fact, the California Supreme Court does not have time to consider all the claims which may be meritorious, and it has made it clear (*Kowis v. Howard* (1992) 3 Cal 4th 888, 897) that summary denial of a writ petition is not a decision on the merits.

The policy of the U.S. Supreme Court is very similar. In *Brown v Allen* (1953) 344 U.S. 443, 456,

Justice Frankfurter (stating the majority position of the Court on this point, as the syllabus says) notes:

> We have frequently said that the denial of certiorari "imports no expression of opinion upon the merits of a case." House v. Mayo (1953) 324 U.S. 42, 48; Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. (1916) 240 U.S. 251, 258: ["As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."]

Since a ruling of general applicability is always the objective of the granting of certiorari, a properly developed factual record is an essential prerequisite.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 415, protects all litigants from being denied federal protection of their Due Process rights, without their consent, saying:

> Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred special categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take

> such jurisdiction." Willcox v. Consolidated Gas Co. (1909) 212 U.S. 19, 40.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 417, observes that (where there is not a need for an authoritative state court construction of an ambiguous statute) a party has a right to access to Federal District court for a final determination of his claim. (*NAACP v Button* (1963) 317 U. S. 415, 427). *England, supra*, affirms:

> The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 417, notes that in cases where a defendant does not initiate litigation, a primary fact determination by a District Court is still a defendant's right. This is so even where fact findings on federal constitutional contentions are

made by a state tribunal in the first instance. (See *Townsend v Sain* (1963) 372 U.S. 293, 312-319.) Defendants seek to use their right to fact finding in federal court to bring the record up to the standards in *Townsend v Sain*, cited by the Court in *England*, *supra*.) *Townsend v Sain* (1963) 372 U.S. 293, 313-314 held:

> There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts.

Townsend v Sain (1963) 372 U.S. 293, 314 held:

> Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the

facts, a hearing is compelled to ascertain the facts.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.

Townsend v Sain (1963) 372 U.S. 293, 316 held:

Our present concern is with errors which, although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.

Townsend v Sain (1963) 372 U.S. 293, 319 held:

> Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one.

Justice White's opinion in *Rose v Mitchell* (1979) 443 U.S. 545, 592, does not agree with the Court's opinion, that discriminatory selection of a non-voting grand jury foreman is not sufficiently relevant to invalidate an indictment, but no justice disagrees with his citation of *Townsend v Sain* (1963) 372 U.S. 293, 313, as the appropriate standard, whereby "[an] evidentiary hearing must be held 'unless the state-court trier of fact has after a full hearing reliably found the relevant facts.'"

Wheat v United States (1988) 486 U.S. 153, 162 quotes with approval this holding of *Glasser v United States* (1942) 315 U.S. 60, 70: "To preserve the protection of the Bill of Rights for hard-pressed

defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

In a case triggering a wide ranging discussion of Due Process requirements, six justices agree with Justice O'Connor's least demanding standard in *Ford v Wainwright* (1986) 477 U.S. 399, 430 notes: "If there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394 (1914)."

Under Rule 44.3, this Court can ask for citation of a ruling by any judge, which addresses any legal or factual aspect of the disputed attorney fees awards. There has been no such ruling; when this is confirmed, Defendants' right to a fact-finding remand to Federal District Court will be obvious.

Certificate re Grounds for Rehearing

Self represented Appellants Michael Halliwell and James Parker hereby affirm that this Petition for Rehearing is submitted not for delay, and as the most feasible way of avoiding yet more delay in the compilation of an appropriate factual record for a decision on their federal claims.

We affirm that our Petition is a good faith effort to inform the Court of controlling developments since our previous submissions, related new case law citations, and a minimum of background to tie in with our October 15, 2009 Supplemental Brief.

_____

Michael Halliwell

_____

James Parker